(1) Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

CIM INSURANCE CORPORATION,

Petitioner,

v.

ARMETTIA PEACH, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Appellate Court of Illinois erred, and deepened a conflict between and among state and federal appellate courts applying the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, by refusing to allow a non-signatory to compel arbitration under the very contract that forms the basis for the non-signatory's alleged liability.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner CIM Insurance Corporation hereby states that it is a wholly owned subsidiary of Motors Insurance Corporation, which in turn is a wholly owned subsidiary of GMAC Insurance Holdings, Inc., which in turn is a wholly owned subsidiary of General Motors Acceptance Corporation, which in turn is a wholly owned subsidiary of General Motors Corporation, a publicly traded corporation. No other company owns 10% or more of petitioner's stock.

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INTRODUCTION

This case presents the question whether the Federal Arbitration Act ("FAA") allows a person who has signed a contract with an arbitration clause to sue a non-signatory under that very contract, but then turn around and argue that the non-signatory cannot invoke the arbitration clause. The answer to that question, as a matter of both law and common sense, is no. If a plaintiff seeks to saddle a non-signatory defendant with the *burdens* of a contract containing an arbitration clause, the strong federal policy favoring arbitration operates to estop the plaintiff from denying the defendant's right to invoke the *benefits* of the contract's arbitration clause.

Indeed, no fewer than seven federal courts of appeals—the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits—have concluded that non-signatory defendants can compel arbitration under the FAA under these circumstances. *See, e.g., JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 (2d Cir. 2004); *Astra Oil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276, 279-81 (2d Cir. 2003); *Choctaw Generation Ltd. P'ship v. American Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); *Long v. Silver*, 248 F.3d 309, 319-21 (4th Cir. 2001); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527-28 (5th Cir. 2000); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-98 (2d Cir. 1999); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756-58 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981). These courts recognize that the FAA would be

undermined if a plaintiff could rely on a contract both as a sword against a defendant and as a shield to preclude that defendant from compelling arbitration of claims arising under that very contract.

In this case, however, the Illinois Appellate Court expressly rejected the foregoing federal authorities, and held that respondent is entitled to litigate her claims against petitioner in court, even though those claims depend on a written contract with an arbitration clause. In so holding, the Illinois court noted that the D.C. Circuit's decision in *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003), also conflicts with the foregoing authorities, and then likewise concluded (against the overwhelming weight of authority) that a non-signatory cannot invoke equitable estoppel to compel arbitration under the FAA. To allow petitioner to compel arbitration, the Illinois court asserted, "would unfairly deny [respondent] access to the courts and force her to arbitrate her claims against [petitioner], in spite of the fact that [petitioner] was not a party" to the contract containing an arbitration clause. App. 10a.

The conflict between the Illinois Appellate Court and the D.C. Circuit, on the one hand, and the seven other federal circuits noted above, on the other, warrants this Court's review. There is no issue of greater practical importance in American civil litigation today than the extent to which litigants can enforce (or avoid) arbitration agreements. The court below blasted a gaping hole in the FAA by providing a roadmap for parties to avoid arbitration agreements by suing non-signatories. Accordingly, this Court should grant the petition and resolve the conflict on this important and recurring question.

OPINIONS BELOW

The Illinois Appellate Court's decision is reported at 816 N.E.2d 668 and reprinted in the Appendix ("App.") at 1a-10a. The Illinois Supreme Court's unpublished order denying discretionary review is reprinted at App. 11a. The Illinois trial

court's unpublished order denying petitioner's motion to compel arbitration is reprinted at App. 12a-22a.

JURISDICTION

The Illinois Appellate Court rendered its decision on September 24, 2004. App. 1a. Petitioner then filed a timely petition for discretionary review by the Illinois Supreme Court, which was denied on November 24, 2004. App. 11a. Justice Stevens extended the time to file this petition to and including March 24, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Act provides in pertinent part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the Federal Arbitration Act provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any … court … for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4.

STATEMENT OF THE CASE

A. Factual Background

Petitioner CIM Insurance Corporation is one of the world's largest underwriters of automotive extended protection plans. Such plans offer consumers mechanical breakdown coverage, emergency roadside assistance, and access to a variety of other services following expiration of the vehicle manufacturer's warranty. As a result, such plans are particularly valuable to consumers purchasing pre-owned vehicles, which typically are not subject to an original factory warranty at the time of purchase.

In August 2002, respondent Peach purchased a pre-owned Jeep Grand Cherokee Laredo from an Enterprise Car Sales dealership in Glen Carbon, Illinois. To augment the 1-year/12,000 mile limited warranty otherwise offered by Enterprise, Peach simultaneously purchased a 5-year/54,000 mile "Major Guard" extended protection plan. That plan was underwritten by CIM.

Those purchases were recorded in a contract, the "Vehicle Buyer's Order," signed by both Peach and Enterprise. Among other things, that contract contained a binding arbitration clause stating, in pertinent part:

> [A]ny controversy or claim by or between me and you of any kind or nature whatsoever relating to or arising out of or in connection with this Order ... shall, to the extent not prohibited by applicable law, upon the election of either party, be settled by arbitration ....

App. 43a.

B. Proceedings Below

Just ten days after the purchase, Peach filed a six-count putative nationwide class action against CIM in the circuit court of Madison County, Illinois (recently labeled the Nation's

"Number One Judicial Hellhole," American Tort Reform Foundation, *Judicial Hellholes: 2004*, at 14, *available at* http://www.atra.org/reports/hellholes/report.pdf). As amended, the complaint asserts both breach of contract and related tort claims against CIM, but does not name Enterprise as a defendant. *See* App. 23a-42a.

In particular, the complaint alleges that the contract between Peach and Enterprise was "inherently deceptive" because it suggested that all charges for the extended protection plan were "pass[ed] through" to CIM, whereas in fact "CIM's agents"—here, Enterprise—actually "retain[ed] a substantial amount of the charge collected for the [plan]." App. 25a-26a. According to the complaint, that alleged misrepresentation injured Peach, "for had [she] known that charges for [the extended protection plan] ... were negotiable [with the dealer], neither she nor other average consumers ... would have paid as much as they did." App. 26a.

The complaint alleges that CIM, although not a signatory to the contract, is responsible for the contract because "CIM supplied Enterprise and the other dealers with uniform blank forms with CIM's logo for use in dealing with consumers." App. 25a; *see also* App. 23a ("[T]his case is about the form contracts used by CIM Insurance Corporation ... to deceive consumers regarding the amounts paid to CIM for CIM [extended protection plans]."). Thus, the complaint repeatedly alleges that "CIM (as *principal*) authorized Enterprise and other dealers (as *agents*) to ... execute [such] contracts," App. 25a (emphasis added); *see also* App. 24a-27a, 29a, 40a, and specifically charges CIM with breach of contract on the following ground:

> Enterprise and the other auto dealerships that sell CIM EPPs [extended protection plans] to auto purchasers are CIM's *agents* for the purpose of generating EPP sales for CIM. As the *principal*/EPP provider, CIM *controls* the auto

> dealers' manner and method of solicitation, including the representations they make on the form contracts documenting the EPP purchases. *As the principal in the EPP transactions, CIM is liable for any breach of the contracts.*

App. 40a (emphasis added). Indeed, the complaint expressly asserts that the arbitration clause in the contract signed by Peach and Enterprise "attempts to mandate arbitration in the event the purchaser/insured makes a claim against the seller (i.e. agent *or principal*)." App. 26a (emphasis added).

CIM responded to the complaint by moving to stay proceedings in the trial court and to compel arbitration of Peach's claims under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. The Madison County trial court (Byron, J.), however, denied the motion by entering, without alteration, an order drafted by Peach's counsel. *See* App. 12a-22a.

That order held that CIM cannot compel arbitration here because it "is not a signatory to the agreement." App. 15a. It is immaterial, the court asserted, that CIM's alleged liability (as the "principal" in an alleged principal/agent relationship with Enterprise) depends on the very contract containing the arbitration clause. Although the complaint specifically alleges a principal/agent relationship, the court held, "Defendant has not admitted such a relationship in its pleadings, and Defendant has not introduced any evidence supporting the existence of such a relationship." App. 16a n.1. The court acknowledged that numerous federal decisions have compelled arbitration where, as here, the complaint seeks to impose liability on a non-signatory under a contract containing an arbitration clause, but stated that those decisions "have not been adopted in Illinois" and "[are] not in line with Illinois' established doctrine of equitable estoppel." App. 16a-17a. At bottom, according to the court, "it would be unfair and inequitable to ... require Plaintiff to arbitrate" her claims against a non-signatory. App. 17a.

CIM appealed the trial court's order, but the Illinois Appellate Court affirmed. *See* App. 1a-10a. Even though the complaint specifically alleges that CIM is liable for the Enterprise contract under a principal/agency theory, the court held that CIM is not entitled to compel arbitration under the FAA because (1) "CIM did not request the trial court to find that Enterprise was its agent," App. 6a, and (2) CIM could not invoke the doctrine of equitable estoppel, App. 9a-10a. The court acknowledged that its holding conflicts with decisions by several federal courts of appeals, *see* App. 6a-7a (citing, *inter alia*, *MS Dealer*, 177 F.3d at 947, and *Grigson*, 210 F.3d at 528), but declared that the reasoning of those decisions conflicts with Illinois law, *see* App. 9a. Indeed, the court pointed out that those decisions conflict with a recent D.C. Circuit decision, *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003), which holds that a non-signatory cannot invoke equitable estoppel to compel arbitration under the FAA. *See* App. 9a (citing 349 F.3d at 683). In sum, the court held, allowing a non-signatory like CIM to compel arbitration under the FAA would "unfairly deny Peach access to the courts." App. 10a.

CIM then unsuccessfully sought discretionary review by the Illinois Supreme Court. *See* App. 11a. This petition follows.

REASON FOR GRANTING THE WRIT

The Illinois Appellate Court Erred, And Deepened A Conflict Between And Among State And Federal Appellate Courts Applying The Federal Arbitration Act, By Refusing To Allow A Non-Signatory To Compel Arbitration Under The Very Contract That Forms The Basis For The Non-Signatory's Alleged Liability.

The Illinois Appellate Court erred, and deepened a conflict between and among federal and state appellate courts, on the question whether the FAA allows a signatory plaintiff to avoid arbitration by suing a non-signatory defendant under the very contract that contains an arbitration provision. The answer to

that question is manifestly no: it would undermine the "liberal federal policy favoring arbitration agreements," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (internal quotation omitted), to allow a signatory plaintiff to avoid a contractual commitment to arbitrate by simply cherry-picking a non-signatory defendant.

That is precisely what Peach did here: Peach sued non-signatory CIM rather than signatory Enterprise to redress an alleged injury arising from the contract between Peach and Enterprise. The complaint seeks to hold CIM responsible for that contract, on the ground that Enterprise was acting as CIM's "agent" in connection with the contract. *See, e.g.*, 24a-27a, 29a-30a, 40a-41a. Indeed, the complaint specifically charges non-signatory CIM with "breach of contract," in its alleged capacity "as the principal" behind Enterprise. App. 39a-40a.

The Illinois Appellate Court, however, refused to consider the nature of Peach's claims in determining whether CIM could compel arbitration of those claims under the FAA. Rather, that court declared that the "dispositive" issue here is that "CIM [is] a nonsignatory to the contract between Peach and Enterprise," and thus not entitled to "enforce the arbitration provision in that contract." App. 2a.

That holding turns the law upside down. To be sure, "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (internal quotation omitted). That does not mean, however, that only the actual signatories to a contract with an arbitration clause can compel arbitration. Indeed, were that the law, arbitration agreements would be practically worthless, because a signatory could routinely evade such agreements by simply suing a non-signatory as a proxy for the signatory.

Not surprisingly, thus, no fewer than seven federal courts of appeals—the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits—have held that a non-signatory *can* compel a signatory to arbitrate under the FAA where, as here, the signatory's claims against the non-signatory depend on the very contract with the arbitration clause. *See, e.g., JLM Indus.*, 387 F.3d at 177-78; *Astra*, 344 F.3d at 279-81; *Choctaw*, 271 F.3d at 406; *Dominium*, 248 F.3d at 728; *Long*, 248 F.3d at 319-21; *Grigson*, 210 F.3d at 527-28; *Smith/Enron*, 198 F.3d at 95-98; *MS Dealer*, 177 F.3d at 947; *Sunkist*, 10 F.3d at 756-58; *J.J. Ryan*, 863 F.2d at 321; *Letizia*, 802 F.2d at 1187-88; *McBro*, 741 F.2d at 344; *Hughes*, 659 F.2d at 839. Precluding non-signatories from compelling arbitration in such circumstances would offer signatories an easy end-run around arbitration and would thereby render "'the federal policy in favor of arbitration effectively thwarted.'" *Grigson*, 210 F.3d at 527 (quoting *MS Dealer*, 177 F.3d at 947; emphasis omitted); *see also J.J. Ryan*, 863 F.2d at 321. In short, these courts recognize that the FAA does not allow a signatory to a contract with an arbitration clause to "'have it both ways': it cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." *Grigson*, 210 F.3d at 528 (quoting *Hughes*, 659 F.2d at 839); *see also Long*, 248 F.3d at 320 ("Allowing [the plaintiff] to avoid the consequences of [a contract with an arbitration provision] while invoking its benefits in a suit against [defendants] would both disregard equity and contravene the FAA.") (internal quotation omitted).[1]

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[1] That is true even with respect to claims that sound in tort, rather than contract, to the extent they depend on the contract with the arbitration clause. *See, e.g., Choctaw*, 271 F.3d at 406; *Sunkist*, 10 F.3d at 757-58; *McBro*, 741 F.2d at 344. A contrary rule, as the Seventh Circuit has explained, "would have the tail wagging the dog, since it would allow a party to defeat an otherwise valid arbitration clause simply by alleging that an

Indeed, the Eleventh Circuit's decision in *MS Dealer* is materially indistinguishable from this case, as a matter of both fact and law. The plaintiff there bought an extended protection plan in connection with her purchase of a pre-owned vehicle. *See* 177 F.3d at 944-45. The contract for the sale of the vehicle and the extended protection plan included an arbitration clause, and was signed by the plaintiff and the retail dealer, but not by MS Dealer, which underwrote the extended protection plan. *See id.* Plaintiff then brought various tort claims against MS Dealer relating to the extended protection plan. MS Dealer moved to compel arbitration under the FAA. The district court denied the motion "on the ground that MS Dealer was not a signatory to the [contract between the plaintiff and the retail dealer] and, thus, did not have standing to compel arbitration." *Id.* at 945.

The Eleventh Circuit reversed. All of the plaintiff's claims against MS Dealer, the Eleventh Circuit explained, arose out of the contract with the arbitration clause. *See id.* at 947-48. Although the plaintiff there did not specifically allege that MS Dealer breached the contract, "each of her [tort] claims depends entirely on her contractual obligation" to pay for the extended protection plan. *Id.* at 948. Thus, the Eleventh Circuit held, the plaintiff was estopped from challenging MS Dealer's right to compel arbitration under that same contract. *See id.* Otherwise, the court explained, the arbitration agreement "would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Id.* at 947 (internal quotation omitted).

This case, if anything, is even easier than *MS Dealer*, because (as noted above) Peach repeatedly alleges that the retail dealer, Enterprise, acted as CIM's "agent," and even asserts a

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agent of the party seeking arbitration has improperly performed certain duties under the contract and thereby committed a tort that is so integrally related to the subject of arbitration between the principal parties as to constitute a bar to such arbitration." *Hughes*, 659 F.2d at 841 n.9.

contract claim against CIM on this theory. Thus, there can be no question here that Peach's claims against CIM are "'inherently inseparable'" from the contract between Peach and Enterprise. *See id.* at 948 (quoting *Sunkist*, 10 F.3d at 757). Under these circumstances, *MS Dealer* cannot be distinguished from this case—which may explain why the Illinois Appellate Court did not even *attempt* to distinguish that case, but simply "rejected" it. App. 9a; *see also Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 542 (Ill. App. Ct. 2004) ("declin[ing] to follow" *MS Dealer* and other federal appellate decisions allowing non-signatories to compel arbitration on the ground that they conflict "with the basic principle of arbitration that a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit") (internal quotation omitted).

The Illinois Appellate Court, however, does not stand alone in holding that the FAA does not authorize a non-signatory to compel arbitration on equitable estoppel grounds. To the contrary, as the court below recognized, *see* App. 7a-9a, the D.C. Circuit's recent *DSMC* decision holds that a non-signatory cannot compel arbitration on those grounds under Section 4 of the FAA, on the theory that "Section 4 ... applies only to an 'alleged failure ... to arbitrate *under a written agreement for arbitration*'—not an alleged failure to arbitrate when principles of equitable estoppel indicate that you should." 349 F.3d at 683 (quoting 9 U.S.C. § 4; emphasis added). In the D.C. Circuit's view, applying equitable estoppel under these circumstances necessarily would "expand [the signatory's] obligation *beyond* the terms of th[e] written agreement." 349 F.3d at 683 (emphasis in original). Thus, the D.C. Circuit held, "an effort to compel arbitration [by a non-signatory] does not fall within Section 4 of the FAA," *id.*, and, as a result, appellate courts lack jurisdiction under the FAA "to hear an appeal of an order denying a [non-signatory's] motion to compel arbitration." *Id.*; *cf.* 9 U.S.C. § 16(a)(1)(B) (conferring appellate jurisdiction over

an order "denying a petition under section 4 of [the FAA] to order arbitration").

The D.C. Circuit acknowledged that "cases from other circuits" have allowed non-signatories to invoke equitable estoppel to compel arbitration. 349 F.3d at 683. The *DSMC* court, however, tried to downplay the conflict by asserting that those other circuits "typically did not address jurisdiction under Section 16 of the FAA, but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with non-signatories." *Id.*

That assertion, however, misses the point. The relevant jurisdictional provision, 9 U.S.C. § 16(a)(1)(B), adds nothing to the analysis, because it simply authorizes appellate jurisdiction over orders denying motions to compel arbitration. The issue, then, is not really one of jurisdiction; rather, it is whether the FAA as a *substantive* matter authorizes non-signatories to compel arbitration on equitable estoppel grounds in the first place. The D.C. Circuit simply asserted that a non-signatory invoking equitable estoppel by definition is not "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate *under a written agreement for arbitration*," 9 U.S.C. § 4 (emphasis added), but that assertion is incorrect. Where a signatory seeks to impose liability on a non-signatory under a contract with an arbitration clause, the non-signatory *is* "aggrieved" by the signatory's failure to abide by its obligation to arbitrate *under that written contract*. *See, e.g.*, *Dominium*, 248 F.3d at 728 ("It would be inequitable to allow [signatories] to claim that [non-signatories] are liable for failure to perform under a contract and at the same time deny that *they are contractual parties* in order to avoid enforcement of the arbitration clause.") (emphasis added).

Regardless of the merits, however, there can be no dispute that the decision below, holding that a non-signatory *cannot* compel arbitration under the FAA on equitable estoppel grounds, conflicts with decisions from the Second, Fourth,

Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, holding that a non-signatory *can* compel arbitration under the FAA on those grounds. This Court can, and should, now resolve the conflict on this important and recurring issue, which has "spawned a burgeoning array of secondary authorities." *International Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 418 n.5 (4th Cir. 2000) (citing authorities). Indeed, the Illinois Appellate Court even attempted to justify its narrow interpretation of the FAA in part on the ground that "[t]he United States Supreme Court has not directly addressed the issue of using equitable estoppel ... to allow a nonsignatory to force a signatory to arbitrate." *Ervin*, 812 N.E.2d at 542. It is time to end the suspense.

Finally, the Illinois Appellate Court cannot evade review on this important question of federal law by simply denying that it is a question of federal law in the first place. The court below, relying on its decision several months earlier in *Ervin*, held that whether a non-signatory can invoke equitable estoppel to compel a signatory to arbitrate under the FAA is a question of *state*, not *federal*, law. *See* 9a-10a; *Ervin*, 812 N.E.2d at 542 ("State-law contract principles govern standing and the obligation to arbitrate.") (emphasis omitted); *see also id.* at 543 ("[A]rbitration is first a matter of consent, and consent is to be determined by applying state law.") (internal citation omitted); *American Ins. Co. v. Cozort*, 871 S.W.2d 575, 579 (Ark. 1994) ("In determining whether nonsignatories should properly be deemed parties to an arbitration contract pursuant to the Federal Arbitration Act, state law contract principles are invoked.").

Rather than avoiding a conflict by purporting to rest its holding on state law grounds, the Illinois Appellate Court simply highlighted the conflict. Numerous other courts, in contrast to the Illinois and Arkansas cases noted above, have held that the question whether a non-signatory can invoke (or be bound by) an arbitration agreement is a question of *federal* substantive law under the FAA. *See, e.g., Washington Mut.*

Fin. Group v. Bailey, 364 F.3d 260, 267 & n.6 (5th Cir. 2004) ("We agree with" courts that have held that "the determination of whether a non-signatory is bound by an arbitration provision" presents an issue of federal law, "and thus find it appropriate to apply the doctrine of equitable estoppel as outlined by federal courts without reference to [state] law"); *International Paper*, 206 F.3d at 417-18 & n.4 ("Because the determination of whether ... a nonsignatory ... is bound by the ... contract presents no state law question of contract formation or validity, we look to the 'federal substantive law of arbitrability' to resolve this question."); *Letizia*, 802 F.2d at 1187 ("Because the issue [whether a non-signatory can compel arbitration] involves the arbitrability of a dispute, it is controlled by application of federal substantive law rather than state law."); *Alliance Title Co. v. Boucher*, No. B176545, __ Cal. Rptr. 3d __, 2005 WL 477862, at *3 (Cal. Ct. App. Mar. 2, 2005) ("The question ... whether ... a nonsignatory ...can ... compel plaintiff to arbitrate his claims ... is answered not by state law, but by the federal substantive law of arbitrability."); *Metalclad Corp. v. Ventana Envtl. Org. P'ship*, 1 Cal. Rptr. 3d 328, 334 (Cal. Ct. App. 2003) ("Whether ... a nonsignatory to [an arbitration] agreement, may rely on it to compel [a signatory] to arbitration is answered by federal law, not state law.").

Indeed, the many federal appellate cases that have allowed non-signatories to compel arbitration have not purported to base that conclusion on state law; rather, they have relied on other federal authorities applying the FAA. *See, e.g., JLM Indus.*, 387 F.3d at 177-78; *Astra*, 344 F.3d at 279-81; *Choctaw*, 271 F.3d at 404; *Dominium*, 248 F.3d at 728; *Grigson*, 210 F.3d at 527-28; *MS Dealer*, 177 F.3d at 947; *Sunkist*, 10 F.3d at 756-58; *J.J. Ryan*, 863 F.2d at 320-21; *Letizia*, 802 F.2d at 1187-88; *McBro*, 741 F.2d at 344; *Hughes*, 659 F.2d at 839; *cf. Washington Mut.*, 364 F.3d at 267 n.6 ("[N]early all federal circuit courts faced with the specific question ... to what extent

a non-signatory is bound by an arbitration provision contained in a contract she is suing under ... have applied the federal substantive law of arbitrability to resolve the issue.").[2]

That approach makes sense: as this Court has long recognized, the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); *see also Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-05 (1967). And that substantive federal law would be "contravened" by allowing signatories to avoid arbitration agreements by simply suing non-signatories under the very contract containing the arbitration clause. *International Paper*, 206 F.3d at 418. Thus, "the rule [allowing non-signatories to compel arbitration] is an outgrowth of the strong federal policy favoring arbitration." *Letizia*, 802 F.2d at 1188.

In any event, the key point for present purposes is not whether the Illinois Appellate Court is right or wrong in holding that this issue is governed by state, rather than federal, law. Rather, the point is that the Illinois Appellate Court's reliance on state law does not avoid—but instead highlights—the conflict calling for this Court's review.

Indeed, even if this issue were governed by state rather than federal law, the Illinois Appellate Court still violated the FAA by discriminating against arbitration. As noted above, Peach

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[2] The Fourth Circuit stated in passing in *Long* that "[a] non-signatory may invoke an arbitration clause under ordinary *state-law* principles of agency or contract." 248 F.3d at 320 (emphasis added). That statement is puzzling, not only because the Fourth Circuit squarely held both before and after *Long* that this issue was governed by *federal* law, *see International Paper*, 206 F.3d at 417-18 & n.4, *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160 & n.1 (4th Cir. 2004), but also because *Long* itself looked *only* to federal precedents in analyzing the issue, and did not cite a single state case, *see* 248 F.3d at 320-21.

alleges throughout her complaint that CIM is the "principal" behind the contract, and that Enterprise merely acted as CIM's "agent" in this regard, *see, e.g.*, App. 24a-27a, 29a-30a, 40a-41a, and those allegations provide the basis for her attempt to hold CIM liable in the first place. Under settled Illinois law (at least as applied outside the arbitration context), "[a]llegations contained in a complaint are judicial admissions and are conclusive against the pleader." *Calloway v. Allstate Ins. Co.*, 485 N.E.2d 1242, 1245 (Ill. App. Ct. 1985); *see also* 30 *Illinois Law & Practice*: *Pleading* § 24 (2004) ("The allegations or admissions contained in a pleading are conclusive as against the pleader."); *Baker v. Daniel S. Berger, Ltd.*, 753 N.E.2d 463, 470 (Ill. App. Ct. 2001) (same). Accordingly, the allegations of a principal/agency relationship in Peach's complaint should have been deemed "conclusive" as against Peach, and hence should have estopped her from challenging CIM's right to compel arbitration. Only by following a different approach in the arbitration context (saddling *CIM* with the burden of proving "that Enterprise was its agent," App. 6a) did the court justify its refusal to compel arbitration. Thus, even assuming *arguendo* that state law governed the question whether CIM could compel arbitration here, the Illinois Appellate Court violated the FAA by answering that question in the negative in a way that discriminates against arbitration. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

At bottom, the issue presented in this case is straightforward. Peach is trying to circumvent the arbitration clause in her contract with Enterprise while bringing a lawsuit against CIM based on that very contract. This, consistent with the FAA, she cannot do. Because the decision below is not only wrong, but also deepens a conflict between and among state and federal appellate courts on an important and recurring issue of federal law, this Court should grant review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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March 10, 2005

APPENDIX

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Appellate Court of Illinois,
Fifth District.

Armettia PEACH, on Behalf of Herself and All Others Similarly Situated,
Plaintiff-Appellee,
v.
CIM INSURANCE CORPORATION,
Defendant-Appellant.
No. 5-03-0684.

Rule 23 Order Filed Aug. 27, 2004.
Motion to Publish Granted Sept. 24, 2004.
Opinion Filed Sept. 24, 2004.

Justice DONOVAN delivered the opinion of the court:

This is an appeal from the Madison County circuit court's refusal to compel plaintiff Armettia Peach to arbitrate her claims against defendant CIM Insurance Corp. (CIM). On appeal, CIM seeks the reversal of the circuit court's arbitration ruling. This interlocutory appeal followed; we have jurisdiction pursuant to Illinois Supreme Court Rule 307(a) (1) (188 Ill. 2d R. 307(a)(1)). We affirm.

BACKGROUND

Armettia Peach filed a class action complaint against CIM for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2000)), common law fraud by misrepresentation, conspiracy to commit consumer fraud, and breach of contract.

CIM sells "Extended Protection Plans" (EPPs) to consumers who purchase automobiles. Peach's complaint alleged that CIM, through Enterprise Car Sales (Enterprise), a car dealership located in Glen Carbon, Illinois, misrepresented to consumers that the full amount paid by the consumers for the EPPs would

be passed through to CIM when, in fact, and unknown to the consumers, the dealerships retained a portion of the proceeds. This alleged fraud was accomplished through the "Vehicle Buyer's Order" (VBO), which listed the EPP under the heading "Other Charges," grouped together with other pass-through charges, such as "License Fee" and "Documentary Fee." The accompanying CIM EPP form contract likewise represented that the amount paid for the EPP was passed through to CIM. However, only a portion of the amount listed on these form contracts was "passed through" to CIM for the extended warranties, and the remainder was retained by the dealer.

After the suit was filed, CIM filed a motion to compel arbitration and to stay the litigation of Peach's first amended complaint. CIM premised its entitlement to compel arbitration on the presence of an arbitration provision in the contract between Peach and Enterprise. Pointing to Peach's allegation in her complaint that Enterprise acted as CIM's agent in accomplishing the claimed fraud, CIM argued that, as the alleged principal behind the alleged fraud, CIM should be entitled to enforce the arbitration provision even though CIM was not a signatory to the contract. Peach opposed CIM's motion.

The trial court entered an order denying CIM's motion. According to the order: (i) CIM cannot enforce the arbitration provision in the contract between Peach and Enterprise, (ii) the arbitration provision is unconscionable because it precludes class action relief, (iii) the arbitration provision lacks mutuality of obligations, (iv) the costs of arbitration are prohibitively high, and (v) the arbitration provision is a part of a fraudulent scheme. CIM then filed a notice of interlocutory appeal. We will limit our analysis to whether CIM, as a nonsignatory to the contract between Peach and Enterprise, can enforce the arbitration provision in that contract, because it is dispositive of this case.

ANALYSIS

An order to compel arbitration is injunctive in nature and is appealable under Supreme Court Rule 307(a)(1) (188 Ill. 2d R. 307(a)(1)). *Salsitz v. Kreiss,* 198 Ill. 2d 1, 11 (2001). Generally, the standard employed in reviewing an interlocutory order granting or denying a motion to compel arbitration is whether the circuit court abused its discretion. *Bishop v. We Care Hair Development Corp.,* 316 Ill. App. 3d 1182, 1189 (2000). However, a review of a trial court's construction of the arbitration agreement states a question of law that is subject to a *de novo* standard. *Caligiuri v. First Colony Life Insurance Co.,* 318 Ill. App. 3d 793, 800 (2000). In reviewing whether CIM must either stipulate to a principal-agency relationship with Enterprise or demonstrate facts proving such a relationship to invoke the arbitration provision in the contract between Peach and Enterprise, we apply a *de novo* standard of review. In deciding whether there was a sufficient showing in the record to infer a finding of agency, we apply an abuse-of-discretion standard. We will also apply a *de novo* standard of review in deciding whether CIM should be allowed to compel arbitration based on equitable estoppel.

Initially, we acknowledge that Congress enacted the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq.* (1994)) in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[ ] and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991). The FAA reflects a "liberal federal policy favoring arbitration agreements" (*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983); *Borowiec v. Gateway 2000, Inc.,* 209 Ill. 2d 376, 384 (2004)) and provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement (9

U.S.C. § 4 (1994)). *Ervin v. Nokia, Inc.*, 349 Ill. App. 3d 508, 510 (2004).

CIM argues that pursuant to *Caligiuri v. First Colony Life Insurance Co.*, 318 Ill. App. 3d 793, 800 (2000), a nonsignatory to an arbitration clause can invoke an arbitration agreement under an agency theory. We agree. But we also note that *Caligiuri* held, "Under either federal or Illinois law, the right to compel arbitration stems from an underlying contract and generally may not be invoked by a nonsignatory to the contract." *Caligiuri*, 318 Ill. App. 3d at 800. In addition, the court in *Caligiuri* found that the nonsignatory in its case could not invoke the arbitration clause because it had failed to show it was the agent of the signatory to the arbitration agreement. Specifically, the court stated:

> In sum, MLLA presented some evidence that it was controlled by MLPF & S [ ] but that such control was limited by state insurance laws and stock exchange requirements. MLLA did not point to evidence in the record showing that it had the ability to conduct legal transactions in the name of MLPF & S. The trial court, as the trier of fact, found that MLLA failed to show it was an agent of MLPF & S in this context. Given the record on appeal, the trial court's ruling was not arbitrary or clearly erroneous.

Caligiuri, 318 Ill. App. 3d at 803.

In addition to *Caligiuri*, we find that our opinion in *Ervin v. Nokia, Inc.*, 349 Ill. App. 3d 508 (2004), is determinative of the issue in this case. In *Ervin*, Ervin, a phone user, brought a putative class action against phone manufacturer Nokia, Inc. (Nokia), and phone service providers AT & T Corp., AT & T Cellular Services, Inc., and American Telephone & Telegraph Company (AT & T) to recover damages for the alleged manufacture and sale of a defective product. AT & T's motion

to stay proceedings and compel arbitration was granted. Nokia also moved to stay proceedings and compel arbitration based on the arbitration provision in AT & T's contract with Ervin. The trial court denied the motion. Nokia filed an interlocutory appeal. We found that Nokia was not a party to the service contract, that Nokia was not a principal or agent of the service provider, that Nokia was not a third-party beneficiary of the contract, and finally, that Nokia could not compel arbitration pursuant to principles of equitable estoppel. Specifically, in *Ervin* we stated:

> Here, Nokia not only does not allege that it is the agent or principal of AT & T, but it steadfastly denies any suggestion that Nokia is in any way related to AT & T. Nokia's argument is that it should be allowed to enforce the arbitration clause contained in the WSG because Ervin's amended complaint implies an agency theory of liability. Nokia did not ask the court to make a finding that it was the agent or principal of AT & T, although it could have requested that finding based on Ervin's original pleading in which he alleged an agency between Nokia and AT & T. *See Pettigrew v. Putterman,* 331 Ill. App. 3d 633, 641 (2002) ("The admissions of a party contained in an unverified original pleading that has been superseded by an amended pleading are not binding judicial admissions; however, such admissions may be used at trial as evidence of the matter admitted"). If the court had made a factual determination that Nokia was the agent or principal of AT & T, then Nokia would have been judicially estopped from taking a different position in the subsequent resolution of this matter (*see Johnson v. Du Page Airport Authority,* 268 Ill. App. 3d 409, 416 (1994) ("The doctrine of judicial estoppel prohibits parties from

> adopting inconsistent legal positions in separate legal proceedings")), and this would have been inconsistent with Nokia's evident desire to distance itself from AT & T in the resolution of this dispute, whether it takes place in the courts or through arbitration. Considering the fact that Nokia contends it is not the agent of AT & T, we find that it is not appropriate to deviate from the general policy in Illinois that a nonsignatory should not be forced to arbitrate a dispute pursuant to an arbitration clause it had not agreed to or be forced to invoke an arbitration clause to resolve a dispute pursuant to an arbitration agreement to which it is not a party.

Ervin, 349 Ill. App. 3d at 513-14.

In this case, CIM did not request the trial court to find that Enterprise was its agent. CIM has actually refused to take any position in the trial court or in this court regarding its relationship to Enterprise.. We can only assume that this is a tactical decision that will allow CIM, once it reaches arbitration, to deny that Enterprise was its agent, thereby refuting the exact allegation that allowed it to go to arbitration in the first place. Considering that an arbitration clause cannot generally be invoked by a nonsignatory to the contract (*Caligiuri,* 318 Ill. App. 3d at 800), we see no reason to extend this option to CIM when it refuses to take a position on whether it has any legal relationship with Enterprise.

CIM next argues that Peach is equitably estopped from claiming that CIM cannot enforce the arbitration clause. This doctrine is best described in *MS Dealer Service Corp. v. Franklin,* 177 F.3d 942 (11th Cir. 1999):

> Existing case law demonstrates that equitable estoppel allows a nonsignatory to compel arbitration in two different circumstances. First,

> equitable estoppel applies when the signatory to a written agreement containing an arbitration clause 'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory. [Citation.] When each of a signatory's claims against a nonsignatory 'makes reference to' or 'presumes the existence of' the written agreement, the signatory's claims 'arise[ ] out of and relate[ ] directly to the [written] agreement,' and arbitration is appropriate. [Citation.] Second, 'application of equitable estoppel is warranted ... when the signatory [to the contract containing the arbitration clause] raises allegations of ... substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.' [Citation.] Otherwise, 'the arbitration proceedings [between the two signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.' [Citation.]

MS Dealer Service Corp., 177 F.3d at 947.

See also Washington Mutual Finance Group, LLC v. Bailey, 364 F.3d 260, 267-68 (5th Cir. 2004); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (applying the doctrine of equitable estoppel, the court held that "a signatory to [an] agreement cannot * * * 'have it both ways': it cannot, on the one hand, seek to hold the non[ ]signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non[ ]signatory" (emphasis omitted)). In contrast to these decisions, the court in *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003), held that the FAA does not govern the rights of a party who is not a signatory to an arbitration agreement but

seeks to benefit from it anyway. Specifically, the court in *DSMC Inc.* held as follows:

> Instead, Convera's motion to compel was expressly based on principles of equitable estoppel. Convera contended that the relation between DSMC's claims against it and DSMC's claims against NGTL was such that DSMC should be compelled to arbitrate the former along with the latter. Section 4, however, applies only to an 'alleged failure ... to arbitrate under a written agreement for arbitration'—not an alleged failure to arbitrate when principles of equitable estoppel indicate that you should. Convera argued that the DSMC/NGTL contract "satisfies the written arbitration agreement requirement," Convera's Mem. Supp. Mot. to Compel, at 6, but Section 4 does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. Convera's motion to compel is not based on any alleged failure by DSMC to arbitrate under the only written agreement at issue here—the one between DSMC and NGTL. The motion is instead based on an effort to expand DSMC's obligation *beyond* the terms of that written agreement pursuant to principles of equitable estoppel. As appellants acknowledge, "[t]he doctrine of equitable estoppel ... by definition applies where there is no written contract between the parties...." Reply Br. at 6. Convera recognizes that there is no precedent from this court compelling a party to an arbitration agreement to arbitrate with a non[ ]signatory on the basis of equitable estoppel, *see* Appellants' Br. at 22, but cites cases from other circuits that have

> done so. Those cases typically did not address jurisdiction under Section 16 of the FAA[ ] but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with non[ ]signatories. We need not and do not decide whether such an effort can ever succeed. What we do decide is that an effort to compel arbitration in such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA. Accordingly, we hold that this court has no jurisdiction under Section 16(a)(1)(B) to hear an appeal of an order denying a motion to compel arbitration between parties *not* under a written agreement to arbitrate. (Emphasis in original.)

DSMC Inc., 349 F.3d at 683.

We also recently addressed the issue of equitable estoppel in *Ervin*. We declined to extend the current definition of equitable estoppel as described in Illinois law and rejected the definition of equitable estoppel described in *MS Dealer Service Corp.* Pursuant to Illinois law: "A claim of equitable estoppel exists where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person. The party asserting a claim of estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the facts, and such reliance must have been reasonable." *In re Marriage of Smith*, 347 Ill. App. 3d 395, 399 (2004); *see also Blisset v. Blisset*, 123 Ill. 2d 161, 169 (1988). Although estoppel may involve an "involuntary relinquishment," it also requires a showing "'by clear, concise, and unequivocal evidence'" of prejudicial reliance. *American States Insurance Co. v. National Cycle, Inc.*, 260 Ill. App. 3d 299, 308 (1994) (quoting *Old Mutual Casualty Co. v. Clark*, 53 Ill. App. 3d 274, 279 (1977)); *see also State Farm Fire & Casualty Co. v. Kiszkan*, 346 Ill. App. 3d 292, 299 (2004).

The record in this case does not satisfy the requirements of equitable estoppel as defined by Illinois courts. When Peach entered into the contract that had an arbitration clause with Enterprise, she took no action from which CIM could have reasonably relied on to its detriment that she would arbitrate any claim she had against CIM. As we found in *Ervin,* the Illinois law of equitable estoppel is adequate to protect CIM. To expand the doctrine of equitable estoppel, as indicated in the previously cited federal cases, would unfairly deny Peach access to the courts and force her to arbitrate her claims against CIM, in spite of the fact that CIM was not a party to the VBO that Peach entered into with Enterprise. *Ervin,* 349 Ill. App. 3d at 517.

CONCLUSION

Because we find that CIM cannot enforce the arbitration clause contained in the agreement between Peach and Enterprise, we need not address the issues pertaining to the arbitration clause itself.

Affirmed.

CHAPMAN, P.J., and KUEHN, J., concur.

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 24, 2004

Ms. Bevin M. Brennan
Kirkland & Ellis LLP
200 E. Randolph Dr.
Chicago, IL 60601

No. 99299 - Armettia Peach, etc., respondent, v. CIM Insurance Corporation, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal or appeal as a matter of right in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 16, 2004.

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

ARMETTIA PEACH, on behalf of herself and all others similarly situated, Plaintiff, vs. CIM INSURANCE CORPORATION, Defendant.	No. 02 L 1253

ORDER

THIS MATTER comes before the Court on the Motion to Compel Arbitration filed by Defendant CIM Insurance Corporation ("CIM" or "Defendant"). Upon review of the authorities, memoranda, and arguments submitted, the Court hereby denies the motion for the reasons that follow.

CIM moves to compel arbitration of Armettia Peach's ("Plaintiff" or "Peach") claims based on an arbitration clause contained in a non-party's vehicle buyer's order. The applicable clause states, in full:

> **16. Arbitration Notice**
>
> (In this notice, the word "you" refers to the Buyer(s)). Except as provided above, any controversy between me and you of any kind or nature whatsoever relating to or arising out of or in connection with this Order (including any controversy or claim relating to or arising

out of your financing of my purchase of the Vehicle, if applicable) shall, to the extent not prohibited by applicable law, upon the election of either party, be settled by arbitration in accordance with the rules of the American Arbitration Association. There shall be no class action arbitration or relief under this Arbitration Agreement. You agree not to elect arbitration of a dispute in the event that I make an individual (as opposed to class) claim against you in an amount of $10,000 or less. The arbitration award and/or order shall be final and binding on the parties to the arbitration. Confirmation of any entry of judgment on the award and/or decision rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Unless otherwise provided by law, each party shall bear its own costs and expenses (including attorneys' fees and expenses) in connection with any arbitration proceeding except that the cost of the arbitration proceeding itself shall be shared equally by the parties, if permitted by law.

NOTICE OF ARBITRATION AGREEMENT

- THIS AGREEMENT PROVIDES THAT UPON ELECTION BY YOUR OR THE DEALER, ALL DISPUTES BETWEEN YOU AND DEALER WILL BE RESOLVED BY BINDING ARBITRATION.
- IF EITHER YOU OR THE DEALER ELECTS TO ARBITRATE A DISPUTE, YOU GIVE UP YOUR

RIGHT TO GO TO COURT TO ASSERT OR DEFEND YOUR RIGHTS UNDER THIS CONTRACT, EXCEPT FOR MATTERS THAT YOU MAY TAKE TO SMALL CLAIMS COURT.

- YOUR RIGHTS WILL BE DETERMINED BY A NEUTRAL ARBITRATOR, NOT A JUDGE OR JURY.
- YOU ARE ENTITLED TO A FAIR HEARING, BUT THE ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT.
- ARBITRATOR DECISIONS ARE AS ENFORCEABLE AS ANY COURT ORDER AND ARE SUBJECT TO VERY LIMITED REVIEW BY A COURT.

(emphasis in original)

CIM's motion should be granted only if the parties are bound by an arbitration clause and the parties' dispute is covered by the particular clause at issue. *See, e.g., Travis v. American Manufacturers Mut. Ins. Co.*, 335 Ill. App. 2d 1171 (5th Dist 2002); *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 219 (2nd Dist. 2001); *J&K Cement Construction, Inc. v. Montalbano*, 119 Ill. App. 2d 663, 669, 456 N.E.2d 889 (2nd Dist. 1983) ("In addition to ascertaining the existence of an agreement to arbitrate, a court should order arbitration only if the dispute is arbitrable.")

As an initial matter, the Court has reviewed the Vehicle Buyer's Order ("VBO") attached to Plaintiff's complaint as

"Exhibit A" and upon the Court's review of that document, the Court finds, as a matter of fact, that CIM is not a signatory to the agreement. The parties reflected at the bottom of page one are Buyer, "Armettia Ann Peach," and Dealer, "Enterprise Car Sales." This is significant because, in the absence of any alternative basis for allowing CIM to enforce the arbitration agreement, the denial of CIM's motion to compel arbitration is warranted.

The Court further finds, as a matter of fact and law, that there is no alternative basis upon which CIM may enforce the arbitration contract. The contract does not reference CIM, expressly or impliedly, and so CIM cannot demonstrate that it was an intended third-party beneficiary. *MBD Enterprises, Inc. v. American Natl. Bank of Chicago*, 275 Ill. App. 3d 164, 168, 655 N.E.2d 1061, 1064 (1st Dist. 1995). Indeed, the contract defines the parties at the bottom of page one as Buyer, "Armettia Peach" and Dealer, "Enterprise Car Sales." As the arbitration clause states, in relevant part:

> ALL DISPUTES BETWEEN YOU AND DEALER WILL BE RESOLVED BY BINDING ARBITRATION.
> (emphasis in original)

The dealer refers to "Enterprise Car Sales" in the contract, Nowhere is CIM included in this definition of "Dealer," and Defendant did not provide any alternative basis, in fact or law, to find that it is an "intended" beneficiary of the arbitration agreement. Under Illinois law, only an intended beneficiary has rights under a third-party beneficiary contract. *MBD Enterprises, Inc.*, 275 Ill. App. 3d at 168. Accordingly, Defendant's motion to compel is denied for this reason.

The Court notes Defendant's additional argument that it is entitled to enforce the arbitration agreement because it is alleged by Plaintiff to have been in a principal-agent relationship with Enterprise, the other signatory to the contract.

The Court is not persuaded because, in this case, a fair reading of Plaintiff's allegations indicates that the nature of the alleged principal-agent relationship was withheld from Plaintiff at the time of contractual formation. Specifically, it was represented to Plaintiff that the entire charge for credit insurance was being passed through to Defendant, and that Enterprise was merely a conduit for those funds, when, in fact, there allegedly was much more to the relationship between Defendant and Enterprise. It is one thing to recognize that, under some circumstances, a principal may enforce an arbitration clause in a contract entered into by the principal's agent, where the nature of the principal-agent relationship was disclosed and/or should have been known to the other signatory at the time of contractual formation. It is another thing, however, to suggest that a principal may, as part of the fraud, deceive the consumer regarding the nature of the principal's relationship with the agent, and then, once the true nature of the relationship has been revealed, use that relationship as a basis for invoking arbitration. That is what Plaintiff has alleged here. The Court does not read *Caligiuri v. First Colony Life Ins. Co.*, 318 Ill. App. 2d 793, 742 N.E.2d 750 (1st Dist. 2000), relied on by Defendant, as requiring arbitration under such circumstances. Defendant's argument is rejected accordingly.[1]

Defendant also suggests that Plaintiff is equitably estopped from refusing arbitration. For a number of reasons, the Court rejects this argument. First, the specific arbitration doctrine of equitable estoppel urged by Defendant is based on federal case decisions that have not been adopted in Illinois. Second, the

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[1] The Court further observes that the existence of a principal-agent relationship is an issue of fact. Although Plaintiff has alleged a principal-agent relationship, Defendant has not admitted such a relationship in its pleadings, and Defendant has not introduced any evidence supporting the existence of such a relationship. In this respect, this case differs markedly from *Caligiuri*, *supra*, in which the defendant both alleged and sought to prove the existence of a principal-agent relationship in order to invoke the benefit of an arbitration provision.

proposed doctrine is not in line with Illinois' established doctrine of equitable estoppel.[2] Third, Defendant's position conflicts with Illinois jurisprudence that focuses on the intentions of the parties at the time of contractual formation.[3] However, even if the doctrine suggested by Defendant were potentially applicable to this action, the Court observes that the doctrine is equitable in nature, and that its application in a given case is a matter committed to the discretion of the trial court.[4] In this case, the Court, in its discretion, finds as a matter of fact and law that under the circumstances it would be unfair and inequitable to apply the doctrine so as to require Plaintiff to arbitrate.

For all of the foregoing reasons, separately and collectively, the Court finds that Defendant, as a non-signatory to the contract between plaintiff and Enterprise, may not enforce the arbitration clause in that contract, and Defendant's motion to compel arbitration is denied.

Importantly, however, even if CIM had standing to enforce the arbitration provision, which it does not, the arbitration clause contains provisions that make it unconscionable to enforce, and the Court would and does deny Defendant's motion on these grounds, as well. For example, the arbitration clause, again in pertinent part, states:

> There shall be no class action arbitration or relief under this Arbitration Agreement.

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[2] *See, e g , Dill v. Widman,* 413 Ill. 448, 109 N.E.2d 765 (1952); *City of Rockford v. Suski*, 307 Ill. App. 3d 233, 718 N.E.2d 269 (2d Dist. 1999); *Department of Transp. v. LaSalle Natl. Bank*, 251 Ill. App. 3d 901, 623 N.E.2d 390 (2d Dist. 1993); *Citizents Nat. Bank of Alton v. Glassbrenner*, 377 Ill. 270, 36 N.E.2d 364 (1941).

[3] *See, e.g., MBD Enterprises, Inc. v. American Natl Bank of Chicago*, 275 Ill. App. 3d 164, 655 N.E.2d 1061 (1st Dist. 1995).

[4] *See, e.g., Hill v. G E. Power Systems, Inc.*, 282 F.3d 343 (5th Cir. 2002), and *In re Humana Inc. Managed Care Litigation*, 285 F.3d 971 (11th Cir. 2002), *rev'd on unrelated holding*, 123 S.Ct. 1531 (2003).

The arbitration clause completely restricts any class action treatment of arbitrable claims. Such a restriction is inconsistent with Illinois courts' general principle that the class action device is an effective tool to "cope with frauds causing small damages to large groups." *Eshaghi v. Hanley Dawson Cadillac Co., Inc.*, 574 N.E.2d 760 (1st Dist. 1991); *Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269, 746 N.E.2d 1242, 1251 (5th Dist. 2001) ("The policy objective behind the class action is to encourage individuals, who may otherwise lack incentive to file individual actions because their damages are limited, to join with others to vindicate their rights in a single action"); and Hebert B. Newberg & Alba Conte, *Newberg on Class Actions* (3d ed. 1992 and 2001 supp.) ("There are compelling reasons for bringing consumer protection class actions. A class-based effort is more effective than an individual consumer in getting a defendant to modify its conduct. Most individual consumers have claims which are too small to warrant representation by an attorney.") Because the arbitration clause prevents accomplishment of these societal goals by prohibiting the class action procedure, the arbitration clause is unenforceable. *See also, State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (W. Va. 2002), and *Leonard v. Terminix International Co.*, 2002 WL 31341084 (Ala. 2002).

The Court is aware of the recent decision by the first district appellate court in *Hutcherson v. Sears Roebuck Co., et al.*, 2003 WL 214989 (Ill. App. 1 Dist.), but it is distinguishable from the case at bar for numerous reasons. As an initial matter, the *Hutcherson* Court applied Arizona law pursuant to a choice of law provision in the contract at issue. The Court is resolving this case under Illinois law. Second, the parties seeking to enforce the arbitration provision in *Hutcherson* were both signatories to the arbitration clause, and parties to the lawsuit. In this case, CIM is not a signatory to the VBO and the signatory, Enterprise Car Sales, is not a named party defendant.

Third, the *Hutcherson* Court approved of the holding in *Leonard, supra*, that an arbitration clause containing a prohibition on class action treatment is unenforceable as unconscionable when the costs of arbitration are greater than the cost of the amount in dispute. *Hutcherson*, 2003 WL 21498939 at *8. The *Hutcherson* Court distinguished *Leonard* on factual grounds, but, as descried in more detail below, the facts in the case at bar are very similar to *Leonard* because, here, as in *Leonard*, the costs of arbitration are greater than the cost of the amount in dispute. The *Hutcherson* Court specifically approved the reasoning and result in *Leonard*, and so the Court's conclusion in this case is consistent with *Hutcherson*. *Id.*

Nevertheless, even if the ban on class treatment in the clause at issue were not unconscionable, the lack of mutuality in the contract constitutes an independent basis upon which the Court finds that the arbitration clause is unconscionable. Specifically, the arbitration clause prevents the buyer from seeking court redress, but it does not so apply to the dealer. The clause states, in relevant part:

> You agree not to elect arbitration of a dispute in the event that I make an individual (as opposed to class) claim against you in an amount of $10,000 or less.

In *Hutcherson*, the Court refused to find a lack of mutuality, but only because it construed the arbitration agreement as giving the consumer the right to enforce the arbitration provision if the defendant attempted to pursue an action in the civil courts. Here, however, the arbitration agreement is not subject to such a construction. Under the clear terms of the contract, CIM remains free to pursue civil litigation against Plaintiff, and Plaintiff cannot demand arbitration of such civil claims. Even *Hutcherson* appears to recognize that such a situation is unconscionable because it lacks mutuality.

Defendant suggests that *Bishop v. We Care Hair Development Corp., et al.*, 316 Ill. App. 3d 1182 (1st Dist. 2000), precludes a finding of lack of mutuality under such circumstances. This Court disagrees. First, in *Bishop*, some of the appellate court's observations regarding mutuality went further than necessary to resolve the issue at hand. This Court declines to extend *Bishop* beyond its facts. Second, *Bishop* appears to be predicated upon a misreading of the Fifth District appellate court's earlier decision in *Jacob v. C&M Video*, 248 Ill. App. 3d 654 (5th Dist. 1993). Specifically, *Bishop* states that the decision of the Eleventh Circuit United States Court of Appeals in *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985), holding an arbitration provision unconscionable for lack of mutuality of obligation, is irreconcilable with Illinois law. *Bishop* at 1198. *Bishop* then cites *Jacob*, indicating in a parenthetical that *Jacob* "implicitly rejected the holding in *Hull*." *Bishop* at 1198. In fact, *Jacob* does not reject the holding in *Hull*, implicitly or otherwise. Rather, *Jacob* merely recognized that *Hull* was irrelevant to the case *sub judice*, in which *both* parties were limited to arbitration, except that *both* parties could pursue civil litigation for injunctive relief. *Jacob*, 248 Ill. App. 3d at 659. In this respect, *Jacob* reads like *Hutcherson*, appearing to recognize that lack of mutuality may render an arbitration provision unconscionable, but finding no lack of mutuality in the pending case. This Court follows the lead of *Jacob* and *Hutcherson*.

The Court also denies CIM's motion to compel arbitration because the costs of arbitration are prohibitively expensive within the meaning of the United States Supreme Court's holding in *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U.S. 79 (2000) ("[t[he existence of large arbitration costs could preclude a litigant ... from effectively vindicating her ... rights in the arbitral forum.") As a matter of fact, the Court finds the expenses involved in arbitrating plaintiff's claims would amount to approximately $1,000, including but not

limited to expenses for court reporting fees, copying costs, blow ups, *et cetera*. *See* Affidavit of Nathaniel Mudd, submitted by plaintiff in opposition to the motion to compel arbitration. This cost to plaintiff to arbitrate her claim greatly exceeds any cost to her to litigate a dispute worth approximately $400-$500 (*see* report of proceedings at p. 13), thus making arbitration prohibitively expensive.

Relying on the provisions of the Illinois Consumer Fraud Act, Defendant asserted at oral argument that, given the nature of the fee-shifting provision of that statute, Plaintiff could recover her attorneys' fees. However, that argument does not solve the costs issues. That is, CIM's argument is really of no consequence because even if attorneys' fees were excluded from the computation, pure expenses of arbitration still outweigh the costs of litigation. The evidence demonstrates that Plaintiff's arbitration expenses would be approximately $1,000, and Plaintiff's portion of the arbitrator's fee would be $125, so that Plaintiff's total costs of arbitration (even absent attorneys fees) would be approximately $1,125, which the court finds, as a matter of act and law, to be prohibitive. *See, Hutcherson*, 2003 WL 21498939 at *8, and *Leonard* 2002 WL 31341084 at *7.

As a final matter, even if all the above were found not to apply, this Court can still deny CIM's motion to compel arbitration, because plaintiff has adequately alleged in her amended class action complaint that the arbitration clause was included in the VBO "as part of [Defendant's] fraudulent scheme to overcharge Plaintiff and the class and that they, therefore, would forever forgo their overcharge rather than pursue arbitration." *See* First Amended Class Action Complaint at ¶ 13. The law is clear in the Fifth District that when a complaint specifically focuses upon an arbitration provision and alleges it is inserted into a contract as a method to further a wrongful scheme, the parties' disagreement is no longer about the subject matter of the contract and, as such, the

dispute is not covered by the arbitration provision. *Travis v. American Manufacturers Mutual Ins. Co.*, 335 Ill. App. 3d 1171 (5th Dist. 2002), *petition for leave to appeal denied*, 203 Ill. 2d 571 (Ill. Apr 02, 2003) and *Hanke v. American Inter'l South Ins. Co*, 335 Ill. App. 3d 1164 (5th Dist. 2002).

WHEREFORE, for all of these reasons and based on the evidence provided to the Court, and the factual determinations made herein, Defendant CIM's Motion to Compel Arbitration is hereby DENIED. The Court hereby sets a hearing for case management conference at _____a.m./p.m. on _____, 2003.

SO ORDERED.

Entered: [Oct. 7, 2003]

/s/
Nicholas Byron
Circuit Judge

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

ARMETTIA PEACH, on behalf of herself and all others similarly situated, Plaintiff, vs. CIM INSURANCE CORPORATION, Defendant.	No. 02 L 1253

FIRST AMENDED
CLASS ACTION COMPLAINT

Plaintiff, by one of her attorneys, alleges as follows:

INTRODUCTION

1. "Extended protection plans" provide mechanical breakdown coverage and ancillary services after the expiration of the manufacturer's warranty. Extended Protection Plans ("EPPs") are commonly known as extended service contracts, extended service plans, mechanical service contracts and extended warranties (collectively, "EPPs").

2. This case is about the form contracts used by CIM Insurance Corporation (hereinafter, "CIM") and entities (such as Enterprise Car Sales) that sell CIM EPPs (*e.g.*, Mechanical Repair Protection or "MRP") to deceive consumers regarding the amounts paid to CIM for CIM EPPs. (*See* Exhibits A and B, the form contracts used for Plaintiff's transaction.)

PARTIES AND JURISDICTION/VENUE

3. This Court has jurisdiction over this case pursuant to 735 ILCS 5/2-209.

4. Plaintiff, an Illinois citizen, resides in Madison County, Illinois, and the facts that give rise to her claim occurred in Madison County, Illinois.

5. CIM Insurance Corporation ("CIM") is a foreign corporation that does business in Madison County, Illinois and throughout the United States. CIM sells EPPs through entities such as Enterprise Car Sales, and CIM provided the Plaintiff, a Madison County resident, with an EPP during the relevant period. CIM conducts substantial business within Madison County through entities such as Enterprise. Moreover, the transaction or some part thereof out of which this cause of action arose occurred in Madison County. Venue is therefore proper in this Court. 735 ILCS 5/2-101-103.

ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

6. By virtue of the discovery rule and/or the fraudulent concealment of their wrongful conduct in this case, any statutes of limitations are tolled and/or CIM and its agents (such as Enterprise) are estopped from asserting any statute of limitations defenses to the claims raised herein.

7. When Plaintiff and the class purchased EPPs, they did not know (and had no reason to know) of the illicit conduct engaged in by Defendant.

COUNT I

(STATUTORY FRAUD BY MISREPRESENTATION (PRINCIPAL/AGENCY))

8. Plaintiff reincorporates paragraphs 1–7 as if alleged herein.

9. Entities such as Enterprise who sell CIM EPPs to auto purchasers are CIM's agents for the purpose of generating EPP sales for CIM. As the principal/EPP provider, CIM vested authority to Enterprise and other auto dealerships to act as agents to contract for CIM. In order to fulfill duties as agents, CIM supplied Enterprise and the other dealers with uniform blank forms with CIM's logo for use in dealing with consumers. CIM (as principal) authorized Enterprise and other dealers (as agents) to fill in and issue blank form applications and execute EPP contracts. CIM authorized Enterprise and other dealers to collect money from customers on the sale of these EPPs, and CIM knowingly authorized car dealers who sell CIM EPPs (such as Enterprise) to retain a substantial amount of the charge collected for the EPP. As the principal in the EPP transactions, CIM is liable for misrepresentations made by its agents in the transactions.

10. The sale of CIM EPPs is done through the use of form contracts such as Exhibits A and B, which were used for the sale of an EPP to Plaintiff in 2002, when she purchased a car and EPP from Enterprise.

11. These form contracts are inherently deceptive because they falsely represent to consumers that charges for EPPs are pass through charges paid to CIM. Listing the cost of the EPP in conjunction with other non-negotiable items (such as licenses and taxes) suggests that charges for EPPs are similar in nature, and thus non-negotiable pass through charges. In particular, the amount paid for EPP is included under the heading, "Other Charges," and this amount is the "Amount Financed" for an EPP and is grouped with other pass through charges such as

"license fees." (*See* Exhibit A – Vehicle Buyer's Order.) Likewise, CIM's form contract represents that this same amount is the cost of the CIM EPP, and is a pass through charge paid to CIM. (*See* Exhibit B.) The reasonable expectation of these representations is that the amount charged for an EPP is a pass through charge paid to CIM.[5] This manner of disclosure results in gross overcharging of consumers, for had Plaintiff known that charges for CIM EPPs were not pass through charges but were negotiable, neither she nor other average consumers (*i.e.*, absent class members) would have paid as much as they did for CIM EPPs, and/or they would have sought alternative coverage elsewhere.

12. To effectuate the overcharge scheme, Enterprise and the various dealer agents place in their retail installment contracts an arbitration provision which prevents Plaintiff and the class from effectively vindicating their breach of contract, statutory and common law causes of action. Moreover, the arbitration clause at issue is wholly unconscionable because while it attempts to mandate arbitration in the event the purchaser/insured makes a claim against the seller (i.e. agent or principal) it excludes from the purported mandatory arbitration process any claim for $10,000 or less made by the seller (i.e. agent or principal) against the buyer/insured. This one-sided exclusion demonstrates that the only purpose of the arbitration clause is to fraudulently frustrate plaintiff's (and the class's) breach of contract, statutory and common law rights.

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[1] Substantially similar form contracts were industry standard. These contracts described the amount charged/financed for purchases of EPPs as "Amounts Paid to Seller," "Amounts paid to others," or as "Other Charges," and uniformly grouped the charges for EPPs with charges for official fees and taxes, which created and/or confirmed the reasonable expectation that EPP charges were pass through charges. At some time (discovery will confirm the precise date), the form contracts were modified, industry wide, to disclose that the dealer may retain a portion of the proceeds from the sale of EPPs, and thus the EPP charges are not pass through charges.

13. For example, while only applying to claims brought by the buyer/insured against the seller (i.e. agent/principal), the arbitration clause in the form retail installment contracts requires the insured to: a) select an arbitrator whose fees and expenses will be shared equally by the dealer (or whoever is trying to enforce the arbitration clause, in this case CIM) and the insured; b) pay the cost of his or her own attorney, or go through the arbitration process without one; (c) pay the cost of her or her own witnesses, who will be needed to attest to the fact that the amount paid to the dealer was not the total amount passed through to CIM; and (d) pay for the development or presentation of any evidence used at the arbitration. Since the overcharge is on information and belief approximately 40% of the total value of the EPP, or in this case, approximately $952, it would be impossible for Plaintiff or the class to pursue the arbitration process because they would have to spend more in arbitration-related costs than the disputed claim amount. Moreover, the arbitration clause purports to specifically preclude the possibility of class-wide arbitration. Enterprise and the various dealers knew this when it included the arbitration clause in its form retail installment contracts as part of its fraudulent scheme to overcharge Plaintiff and the class and that they, therefore, would forever forgo their overcharge rather than pursue arbitration. Indeed, pursuant to the scheme, the overcharge is always worth less than the cost of pursuing arbitration. As designed, the arbitration clause prevents plaintiff and the class from effectively vindicating their statutory and common law causes of action.

14. The above-described uniform misrepresentations constitute false statements of material fact.

15. Plaintiff brings this claim pursuant to the Illinois Consumer Fraud Act ("ICFA") and the substantially similar statutes of specific sister states,[6] all of which were enacted and

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[6] The claims of Illinois purchases (such as Plaintiff) are brought

designed to protect consumers against unfair, deceptive, or fraudulent business practices. *See, e.g.,* 815 ILCS § 505/1 *et seq.*

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under the Illinois Consumer Fraud Act. The claims of non-Illinois purchaser are brought under the consumer protection statute(s) of their respective states. *See* Ala. Code § 8-19-1 *et seq* (Alabama); Alaska Stat. § 45.50.471 *et seq.* (Alaska); Ariz. Rev. Stat. Ann. § 44-1521 *et seq.* (Arizona); Ark. Code Ann. § 4-88-101 *et seq.* (Arkansas); Cal. Bus. & Prof. Code § 17200 *et seq.*, and Cal. Bus. & Prof. Code § 17500 *et seq.* (California); Colo. Rev. Stat. § 6-1-105 *et seq* (Colorado); Conn. Gen. Stat § 42-110a (Connecticut); Del. Code. Ann. Tit. 6, § 2511 *et seq.* (Delaware); D.C. Code Ann. § 28-3901 *et seq.* (District of Columbia); Fla. Stat. Ann. § 501.201 *et seq.* (Florida); Ga. Code Ann. § 10-1-390 *et seq* (Georgia); Haw. Rev. Stat. § 481A-1 *et seq.* and Haw. Rev. Stat. § 480-1 *et seq.* (Hawaii); Idaho Code § 48-601 *et seq* (Idaho); Ind. Stat. § 24-5-0.5 *et seq* (Indiana); Kan. Stat. Ann. § 50-623 *et seq.* (Kansas); Ky. Rev. Stat. § 367.110 *et seq.* (Kentucky); La. Rev. Stat. Ann. § 51:1401 *et seq.* (Louisiana); Me. Rev. Stat. Ann. Tit. 5, § 205-A *et seq.* (Maine); Md. Com. Law Code Ann. § 13-101 *et seq.*, Md. Com. Law Code Ann. § 13-301 *et seq.*, Md. Com. Law Code Ann. § 13-408 *et. seq.* (Maryland); Mass Gen. L. ch. 93A, § 1 *et seq.* (Massachusetts); Mich. Stat. Ann. § 445.901 *et seq.*, Mich. Stat. Ann. § 19.418(1) *et seq* (Michigan); Minn. Stat. § 325F.68 *et seq.*, Minn. Stat. § 8.31 (Minnesota); Miss. Code Ann. § 75-24-3 *et seq.* (Mississippi); Mo. Rev. Stat. § 407.010 *et seq.* (Missouri); Mont. Code Ann. § 30-14-101 *et seq.* (Montana), Neb. Rev. Stat. § 59-1601 *et seq* (Nebraska); Nev. Rev. Stat. § 41.600 and Nev. Rev. Stat. § 598.0903 *et seq.* (Nevada); N.H. Rev. Stat. Ann. § 358-A:1 *et seq.* (New Hampshire); N.J. Rev. Stat. §56:8-1 *et seq.*, N.J. Rev. Stat. § 56:12-1 *et seq* (New Jersey): N.M. Stat. Ann. § 57-12-1 *et seq.* (New Mexico); N.Y. Gen. Bus. Law. § 349 *et seq* (New York); N.C. Gen. Stat. § 75-1 *et seq.* (North Carolina); N.D. Cent. Code § 51-15-01 *et seq* (North Dakota); Ohio Rev. Code Ann. § 1345.01 *et seq.* (Ohio); Okla. Stat. Tit. 15, § 751 *et seq.* (Oklahoma); Ore. Rev. Stat. § 646.605 *et seq.* (Oregon); Penn. Stat. § 201-1 *et seq.* (Pennsylvania); R.I. Gen. Laws § 6-13.1-1 *et seq.* (Rhode Island); S.C. Code Ann. § 39-5-10 *et seq* (South Carolina); S.D. Codified Laws Ann. § 37-24-1 *et seq.* (South Dakota); Tenn. Code Ann. § 47-18-101 *et seq.* (Tennessee); Tex. Bus. & Com. Code Ann. § 17.41 *et seq.* (Texas); Vt. Stat. Ann. Tit. 9, § 2451 *et seq.* (Vermont); Va. Code Ann. § 59.1-196 *et seq.* (Virginia); Wash. Rev. Code § 19.86.010 *et seq.* (Washington); W. Va. Code § 46A-6-101 *et seq.* (West Virginia); Wisc. Stat. § 100.18 (Wisconsin); and Wyo. Stat. § 40-12-101 *et seq.* (Wyoming).

16. For example, 815 ILCS 505/2 provides:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, ... misrepresentation ... of any material fact ... in the conduct of trade or commerce are hereby declared unlawful ...

17. At all relevant times, Plaintiff, the class and CIM were "persons" within the meaning of 815 ILCS 505/1(c) and substantially similar state statutes.

18. All other states have similar consumer fraud statues [sic] that prohibit material misrepresentations and/or which do not expressly prohibit recovery in this type of case.

19. CIM's (and its agents' such as Enterprise) unlawful and deceptive acts occurred in the conduct of interstate commerce.

20. CIM (and Enterprise) intended that Plaintiff and the class would rely on its deceptive act or practices (*i.e.*, Defendant's uniform misrepresentations).

21. By misrepresenting to Plaintiff and the class in form contracts that charges for EPP is remitted to the EPP provider, CIM created and/or confirmed the reasonable expectation that EPP charges were pass through charges to CIM (when they were not). CIM engaged in unfair, deceptive and fraudulent business practices within the meaning of the ICFA and similar sister state statutes.

22. The fact that, *inter alia*, the amount paid for EPP was not a pass through charge (unlike the other charges grouped with the EPP charge) is a material fact to a reasonable consumer - *i.e.*, it is the type of information that affects a reasonable consumer's purchase decision.

23. By misrepresenting this material fact, CIM engaged in unfair, deceptive and fraudulent business practices within the meaning of the ICFA and similar sister state statutes.

24. As a result of its fraudulent scheme, CIM has been and will continue to be unjustly enriched at the expense of Plaintiff and the class. Specifically, CIM has been unjustly enriched by the receipt of proceeds from the sales of tens of thousands of CIM EPPs issued to Plaintiff class members.

25. CIM's and its agents' deceptive conduct has proximately caused damages to Plaintiff and the other class members.

Class Allegations

26. Plaintiff brings this claim as a class action pursuant to 735 ILCS 5/2-801 on behalf of the following Plaintiff class:

> All persons and entities who: (a) purchased a CIM EPP at the time they purchased a vehicle, (b) signed a contract (substantially similar to Exhibit A as it relates to EPPs),and (c) signed a contract substantially similar to Exhibit B.

27. Members of the Illinois state judiciary, and employees of CIM and Enterprise and their immediate families, are excluded from the above class.

28. The class is so numerous that joinder of all members is impracticable. The class includes thousands of CIM EPP purchasers who fall into the class definition.

29. Questions of law or fact of common and general interest to the class exist with respect to this count include:

(a) Whether entities who sell CIM EPPs are CIM's agents for the purpose of selling CIM EPPs;

(b) Whether CIM's conduct, and/or its agents' conduct, constitutes statutory fraud; and

(c) Whether the class is entitled to damages, and if so, what is the proper measure of damages.

30. These common questions predominate over any individual questions or issues.

31. This claim arises from the same practice and is based on the same legal theory and same form documents.

32. Plaintiff will fairly and adequately represent and protect the interests of the class and has no interests antagonistic to absent class members.

33. Plaintiff has retained competent counsel, experienced in the prosecution and settlement of class actions.

34. A class action is an appropriate method for the fair and efficient adjudication of this controversy. Individual joinder of all members of the class is impractical, if not impossible. Furthermore, as the economic damage suffered by each individual class member is relatively small (on average, less than $500 per class member), the expense and burden of individual litigation would make it difficult, if not impossible, for individual class members to redress the wrongs done to them. Absent a class action, CIM will retain their ill-gotten profits at the expense of Plaintiff class members.

35. The cost to the court systems of such individualized litigation would be substantial. Individualized litigation would also present the potential for inconsistent or contradictory judgments and would greatly increase the delay and expense to all parties and the court system in multiple trials of identical or similar factual issues. Without this class action, Plaintiff and class members will effectively be left without redress or a remedy.

WHEREFORE, Plaintiff requests the following relief:

A. That this Court certify the proposed class and appoint Plaintiff and her counsel to represent the class;

B. That judgment be entered for Plaintiff and the class against CIM; and

C. That damages be awarded to Plaintiff and the class, but in no event more than $75,000 each.

COUNT II
(STATUTORY FRAUD)

36. Plaintiff incorporates the prior paragraphs as if alleged herein.

37. CIM is the architect of a scheme to defraud consumers by inducing consumers into believing that the charges for CIM EPPs are pass through charges paid to CIM, when, in fact, a significant (though as yet still undisclosed) percentage of the charge is not passed through. The scheme is intended to mislead consumers as to the true cost of EPPs, making it appear as though the charge for EPPs is a pass through charge, when it is not. The deception induces consumers to purchase EPPs, and/or forego the opportunity to seek a better deal elsewhere or, in the alternative, negotiate a better deal with the automobile dealer itself.

38. The scheme to defraud consumers is accomplished via a uniform sales scheme and form documents whereby CIM and dealers who sell CIM EPPs, through these form documents, uniformly mislead consumers into creating and/or confirming the reasonable expectation that charges for CIM EPPs are pass-through charges.

39. As a matter of industry practice, CIM fails to disclose to the consumers, for example in CIM's form document (Exhibit B), that a significant percent of the EPP charge is not a pass through charge, but is secretly pocketed by the car dealers.

40. At the same time, CIM instructs car dealers, through the use of form contracts (such as Exhibit B) to represent to consumers through the form documents that the charge for EPP is a pass-through charge. CIM's form contract confirmed and/or created this reasonable expectation because, for example, the contract states that the amount paid for CIM EPP is the

amount of the "Extended Serv. Contract" - and this dollar amount is equal to the dollar amount represented on the contract (Exhibit A) as the EPP pass through charge.

41. CIM participated in the scheme to defraud consumers by supplying dealers with standard form contracts to create and/or confirm the reasonable expectation that EPP charges are pass through charges. While creating this reasonable expectation, the form contracts uniformly fail to disclose the secret up-charge (*i.e.*, that EPP charges are not pass through charges), thus amounting to a uniform misrepresentation of the true amounts paid for EPPs by consumers.

42. CIM is fully aware that it is industry practice for automobile dealers to sell CIM EPPs by using contracts (Exhibit A) that, along with the forms provided by CIM, create and/or confirm the reasonable expectation that charges for EPPs are pass-through charges.

43. In an effort to promote the deception, CIM purposefully allows and instructs automobile dealers to fill in the dollar charges for CIM EPPs on CIM's own forms (Exhibit B) in an amount equal to that represented on the contract (Exhibit A).

44. CIM's failure to correct this deception, either alone, or combined with the affirmative misrepresentations in the form contracts constitutes an unfair and deceptive act or practice.

45. CIM's failure to disclose that charges for EPPs are not pass through charges is a material fact - material facts being the type of information that a reasonable consumer would rely on when making a purchasing decision.

46. By failing to disclose the aforementioned facts and by participating in this sales scheme, CIM engaged in unfair, deceptive and fraudulent business practices within the meaning of the ICFA and similar sister state statutes.

47. CIM's deceptive conduct has proximately caused damages to Plaintiff and the other class members in an amount to be proven at trial.

48. As a result of its sales scheme, CIM has been and will continue to be unjustly enriched at the expense of Plaintiffs and the class. Specifically, CIM has been unjustly enriched by the receipt of proceeds from the sales of tens of thousands of EPPs issued by CIM to Plaintiff class members.

Class Allegations

49. Plaintiff incorporates by reference paragraphs 24-33, except for paragraph 27(a).

WHEREFORE, Plaintiff requests the following relief:

A. That this Court certify the proposed class and appoint Plaintiff and her counsel to represent the class;

B. That judgment be entered for Plaintiff and the class against CIM; and

C. That damages be awarded to Plaintiff and the class, but in no event more than $75,000 each.

COUNT III

(COMMON LAW FRAUD BY MISREPRESENTATION)

50. Plaintiff reincorporates paragraphs 1-7 as if alleged herein.

51. Plaintiff reincorporates paragraphs 8-14 as if alleged herein.

52. CIM and car dealers who sell CIM EPPs, such as Enterprise, knew (or but for their reckless indiffeence would have known) that the statements representing that CIM EPP charges as pass through charges were false.

53. CIM and car dealers who sell CIM EPPs, such as Enterprise, intended that the statements induce Plaintiff and the class to purchase EPPs.

54. Plaintiff and the class reasonably relied on the truth of the material statements. If CIM and Enterprise had disclosed the above facts to Plaintiff (and the class), Plaintiff (and the class) would have prevented economic injury.

55. Plaintiff reincorporates paragraph 25 as if alleged herein.

Class Allegations

56. Plaintiff reincorporates paragraphs 26-28, as if alleged herein.

57. Questions of law or fact of common and general interest to the class exist, including:

(a) Whether the form contracts uniformly misrepresent that the amount paid to the dealer does not include any amount for EPP;

(b) Whether the form contracts uniformly misrepresent to purchasers that the amount charged for EPP is a pass through to the EPP provider;

(c) Whether Defendant's conduct constitutes common law fraud; and

(d) Whether the class is entitled to damages, and if so, what is the proper measure of damages.

58. Plaintiff reincorporates paragraphs 30-35 as if alleged herein.

WHEREFORE, Plaintiff requests the following relief:

A. That this Court certify the proposed class and appoint Plaintiff and her counsel to represent the class;

B. That judgment be entered for Plaintiff and the class against CIM; and

C. That damages be awarded to Plaintiff and the class members, but in no event more than $75,000 each.

COUNT IV
(Common Law Fraud (Fruits Of The Fraud) - AGAINST CIM)

59. Plaintiff reincorporates paragraphs 1-7 as if alleged herein.

60. Count IV is brought against CIM in the alternative to Count III, for knowingly accepting the fruits of the fraud committed by Enterprise and other entities that generate EPP sales for CIM.

61. Plaintiff reincorporates paragraphs 8-14 as if alleged herein.

62. If a third party accepts the fruits of fraud knowing of the means by which they were obtained, he is liable even though he did not participate in the fraud. Here, CIM accepted the EPP business of Plaintiff and the class, knowing that such business was obtained through Enterprise' (and other entities') fraud.

63. Plaintiff reincorporates paragraph 25 as if alleged herein.

Class Allegations

64. Plaintiff reincorporates paragraphs 26-28 as if alleged herein.

65. Questions of law or fact of common and general interest to the class exist with respect to this count include:

(a) Whether the form contracts uniformly misrepresent that the amount paid to the dealer does not include any amounts for EPP;

(b) Whether the form contracts uniformly misrepresent to purchasers that the amout charged for EPP is a pass through charge to the EPP provider;

(c) Whether Enterprise' conduct (and the conduct of dealerships that sell CIM EPPs) constitutes common law fraud;

(d) Whether CIM is liable for that fraud for knowingly accepting the fruits of that fraud; and

(e) Whether the class is entitled to damages, and if so, what is the proper measure of damages.

66. Plaintiff reincorporates paragraphs 30-35, as if alleged herein.

WHEREFORE, Plaintiff requests the following relief:

A. That this Court certify the proposed class and appoint Plaintiff and her counsel to represent the class;

B. That judgment be entered for Plaintiff and the class against CIM; and

C. That damages be awarded to Plaintiff and the class, but in no event more than $75,000 each.

COUNT V

(CONSPIRACY TO COMMIT CONSUMER FRAUD - AGAINST CIM)

67. Plaintiff incorporates the prior paragraphs as if alleged herein excluding allegations relating to agency.

68. This claim is brought against CIM for conspiring with entities who sell CIM EPPs, such as Enterprise, to commit unfair, deceptive or fraudulent business practices, as alleged herein.

69. CIM and entities who sell CIM EPPs, such as Entrprise, combined to accomplish by agreement and concerted action an unlawful purpose - namely, to deceive and profit at the expense of purchasers of CIM EPPs.

70. As alleged herein, CIM and entities that sell CIM EPPs intentionally and uniformly used form contracts to mislead Plaintiffs and the class regarding the charges associated with CIM EPPs. As alleged, the deceptive form contracts created and/or confirmed the reasonable expectation for consumers that charges for CIM EPPs were pass through charges paid to CIM for EPPs. This misleading manner of disclosure resulted in gross overcharging of Plaintiff and consumers, for had Plaintiff known that the price of CIM EPPs was negotiable, neither Plaintiff nor the average consumer (*i.e.*, absent class members) would have paid as much as they did for CIM EPPs, and/or would have sought alternative coverage elsewhere.

71. CIM uses entities such as Enterprise to sell CIM EPPs to consumers/car buyers. CIM was the architect of the scheme to defraud, providing necessary and substantial assistance to car dealers to effectuate the fraudulent scheme. In furtherance of the scheme, CIM authorized and instructed entities that sell CIM EPPs (such as Enterprise) to sell CIM EPPs using preprinted applications that collected financial information including the amount collected by the dealership from the customer for the CIM EPP.

72. CIM conspired with entities that sell CIM EPPs (such as Enterprise) to represent that the charge for the EPP was a sum certain that would be collected by and passed through the dealership to CIM. CIM knowingly authorized entities that sell CIM EPPs (such as Enterprise) to retain a substantial amount of the charge collected for the EPP.

73. CIM both authorized the entities' conduct and provided forms that indicated the information about the amount car dealers and other entities that sell CIM EPPs charged for the EPP.

74. CIM and its car dealers that sell CIM EPPs benefited financially from the fraud. CIM benefited by increased sales of CIM EPPs, and car dealers like Enterprise benefited by

retaining a significant (though as yet undisclosed) portion of the EPP charge.

75. Though hidden from the consumer, CIM coordinates this conspiracy to defraud by controlling the fee-splitting arrangements with its dealers through form contracts that split the ill-gotten proceeds between CIM and car dealers that sell CIM EPPs.

Class Allegations

76. Plaintiff reincorporates paragraphs 24-25 as if alleged herein.

77. Questions of law or fact of common and general interest to the class exist with respect to this count include:

(a) Whether CIM conspired to commit consumer fraud with entities who sell CIM EPPs; and,

(b) Whether the class is entitled to damages, and if so, what is the proper measure of damages.

78. Plaintiff reincorporates paragraphs 30-35 as if alleged herein.

WHEREFORE, Plaintiff requests the following relief:

A. That this Court certify the proposed class and appoint Plaintiff and her counsel to represent the class;

B. That judgment be entered for Plaintiff and the class against CIM; and

C. That damages be awarded to Plaintiff and the class, but in no event more than $75,000 each.

COUNT VI

(BREACH OF CONTRACT - AGAINST CIM (PRINCIPAL/AGENCY))

79. Plaintiff reincorporates the preceding paragraphs as if alleged herein.

80. Enterprise and other auto dealerships that sell CIM EPPs to auto purchasers are CIM's agents for the purpose of generating EPP sales for CIM. As the principal/EPP provider, CIM controls the auto dealers' manner and method of solicitation, including the representations they make on the form contracts documenting the EPP purchases. As the principal in the EPP transactions, CIM is liable for any breach of the contracts.

81. These form contracts represent that the amounts paid to the dealer does not include any amount for EPP. In that regard, the form contracts represent that $2,380.00 was an "Other Charge" paid for "Extended Serv. Contract." (See Exhibit A.) Likewise, CIM's EPP form contract creates and/or confirms this reasonable expectation because it represents that this same amount was paid for EPP - *i.e.*, for an "EMRP" or "Enterprise Mechanical Repair Protection" - and was passed through to CIM. (See Exhibit B.) Stated another way, these form contracts represent to purchasers that the amount charged for EPP is equal to the amount that is passed through to CIM, the EPP provider.

82. CIM's EPP overcharges to Plaintiff and the class constitutes class-wide breaches of contract. As a result of those breaches, Plaintiff and the class have been damaged in the amount of those overcharges. Plaintiff and the class performed all material obligations under the contracts.

Class Allegations

83. Plaintiff incorporates by reference paragraphs 26-28.

84. Questions of law or fact of common and general interest to the class exists, including:

(a) Whether CIM's conduct constitutes breach of contract;

(b) Whether CIM, through its agents (such as Enterprise) has been charging more for EPPs than the amounts passed through to CIM by the agents/dealers;

(c) Whether the overcharges described in (b) constitute breaches of contract; and

(d) Whether the class members are entitled to damages, and if so, what is the proper measure of damages.

85. These common questions predominate over any individual questions or issues.

86. Plaintiff reincorporates paragraphs 30-35 as if alleged herein.

WHEREFORE, Plaintiff requests the following relief:

A. That this Court certify the proposed class and appoint Plaintiff and her counsel to represent the class;

B. That judgment be entered for Plaintiff and the class against CIM; and

C. That damages be awarded to Plaintiff and the class members, but in no event more than $75,000 each.

Dated: January 27, 2003

Respectfully submitted,

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VEHICLE BUYER(S)' ORDER

[* * *]

16. Arbitration Notice

(In this notice, the word you refers to the Buyer(s)). Except as provided above, any controversy or claim by or between me and you of any kind or nature whatsoever relating to or arising out of or in connection with this Order(including any controversy or claim relating to or arising out of your financing of my purchase of the Vehicle, if applicable) shall, to the extent not prohibited by applicable law, upon the election of either party, be settled by arbitration in accordance with the rules of the American Arbitration Association. There shall be no class action arbitration or relief under this Arbitration Agreement. You agree not to elect arbitration of a dispute in the event that I make an individual (as opposed to a class) claim against you in an amount of $10,000 or less. The arbitration award and/or order shall be final and binding on the parties to the arbitration. Confirmation of and entry of judgment on the award and/or decision rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Unless otherwise provided by law, each party shall bear its own costs and expenses (including attorneys' fees and expenses) in connection with any arbitration proceeding except that the cost of the arbitration proceeding itself shall be shared equally by the parties, if permitted by law.

[* * *]

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

No. 04-1221

IN THE

Supreme Court of the United States

CIM INSURANCE CORPORATION,

Petitioner,

v.

ARMETTIA PEACH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

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May 2005

QUESTION PRESENTED

Whether a non-signatory to a contract that provides for arbitration, when sued by a signatory for conduct related to the subject matter of the contract, can compel arbitration on an agency or equitable estoppel theory.

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CIM Insurance Corporation ("CIM") premises its petition on the notion that the Fifth District Appellate Court of Illinois held that "a non-signatory cannot invoke equitable estoppel to compel arbitration under the [Federal Arbitration Act]." Pet. 2; *see id.* 11, 12. This holding, CIM argues, conflicts with the holdings of several federal circuit courts of appeal. However, the appellate court decided the issue on state-law grounds, and CIM did not preserve its current position that the question is one of federal law. Even more important, the court below did not hold that, as a general matter, *a* non-signatory cannot compel arbitration on an equitable estoppel theory. It held that, on the facts of the case, *this* non-signatory cannot compel arbitration on that theory. Because there is no conflict on the question presented, the petition should be denied.

STATEMENT OF THE CASE

In August 2002, respondent Armettia Peach bought a car from Enterprise Car Sales. At the same time, she signed a contract, called a Vehicle Buyer(s)' Order, with Enterprise for purchase of an "extended protection plan." The contract represented that the amount paid for the extended protection plan would be passed through to petitioner CIM, the entity that actually provides such plans to purchasers of automobiles. In fact, only a portion of the price of the plan was passed through to CIM, and the remainder was retained by Enterprise.

Ms. Peach later sued CIM, alleging violations of the state consumer fraud and deceptive business practices statute, common law misrepresentation, fraud, conspiracy to commit consumer fraud, and breach of contract. She alleges that the purchase contract for the extended protection plan was a CIM form contract that misrepresented that the entire price of the plan would be passed through to CIM, and thereby diminished her ability to negotiate the price of the plan.

CIM moved to compel arbitration, relying on the arbitration provision of Ms. Peach's contract with Enterprise. That provision provided, in relevant part:

> [A]ny controversy or claim *by or between me and you* of any kind or nature whatsoever relating to or arising out of or in connection with this Order . . . shall, to the extent not prohibited by applicable law, *upon the election of either party*, be settled by arbitration . . . .

Pet. App. 43a (emphasis added). The contract reiterated the narrow scope of the arbitration provision in a boxed section entitled "Notice of Arbitration Agreement": "THIS AGREEMENT PROVIDES THAT UPON ELECTION *BY YOU OR THE DEALER*, ALL DISPUTES *BETWEEN YOU AND DEALER* WILL BE RESOLVED BY BINDING ARBITRATION," and "*IF EITHER YOU OR THE DEALER ELECTS TO ARBITRATE A DISPUTE*, YOU GIVE UP YOUR RIGHT TO GO TO COURT TO ASSERT OR DEFEND YOUR RIGHTS UNDER THIS CONTRACT . . . ." Sep. App. of Def. A47 (emphasis added). The contract specified that the word "Dealer" referred to Enterprise Car Sales. *Id.* at A46.

Notwithstanding that the right to compel arbitration was expressly limited to "you" (Ms. Peach) and the "Dealer" (Enterprise), CIM sought to compel arbitration on the ground that Enterprise was alleged to be CIM's agent. At the same time, CIM refused to acknowledge that Enterprise was acting as its agent. The trial court denied the motion, and CIM appealed.

The Fifth District Appellate Court affirmed. First, the court recognized the federal policy favoring arbitration agreements embodied in the Federal Arbitration Act. Pet. App.

3a. The court then considered whether a non-signatory to a contract can compel arbitration on the theory that one of the contract signatories was its agent. Reviewing its precedent, the court agreed with CIM that non-signatories can compel arbitration on an agency theory. As in the trial court, however, CIM refused to admit that Enterprise was acting as its agent. The court assumed that CIM had made "a tactical decision that will allow CIM, once it reaches arbitration, to deny that Enterprise was its agent, thereby refuting the exact allegation that allowed it to go to arbitration in the first place." *Id.* 6a. In light of CIM's refusal to state whether Enterprise was its agent, the court held that CIM could not compel arbitration on an agency theory. *Id.*

Next, the court considered CIM's argument that Ms. Peach was equitably estopped from claiming that CIM could not enforce the arbitration clause because of her allegation of agency. Looking to state law, the court stated that equitable estoppel required a showing of reliance by the party seeking to invoke the doctrine. *Id.* 9a. Here, Ms. Peach had taken no action on which CIM could have reasonably relied, to its detriment, to assume that she would arbitrate any claim she had against CIM. Accordingly, on "the record in this case," the court found no equitable estoppel. *Id.* 10a.

CIM sought leave to appeal to the Illinois Supreme Court, which that court denied. *Id.* 11a.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Between The Federal Courts Of Appeals And The Decision Below And No Conflict Among The Circuits On The Question Presented.

Every federal circuit to have reached the issue has found that, in certain circumstances, non-signatories to a contract that provides for arbitration can compel arbitration when sued by a signatory. *See* Pet. 1 (citing cases). The appellate courts of Illinois agree. Accordingly, there is no conflict at all on the core question raised in the petition.

As in the federal cases that CIM contends conflict with the decision below, Illinois courts have recognized that non-signatories may enforce arbitration provisions where the non-signatory is an agent of a signatory or where the requirements of equitable estoppel are met. *See Ervin v. Nokia, Inc.*, 812 N.E.2d 534 (1st Dist. Ill. App. 2004); *Howells v. Hoffman*, 568 N.E.2d 934, 936-37 (3d Dist. Ill. App. 1991) (allowing non-signatory to compel arbitration). The decision below did not hold to the contrary. Rather, it held that none of the bases for allowing a non-signatory to compel arbitration was satisfied on the facts of this case. CIM's statements (Pet. 2, 11, 12) that the court held that a non-signatory cannot compel arbitration based on equitable estoppel are simply wrong.

Moreover, as CIM itself pointed out below, the First District Appellate Court of Illinois has "recognized [that] . . . a nonsignatory to an arbitration contract can invoke arbitration under an estoppel theory." CIM App. Reply 6 (citing *Caligiuri v. First Colony Life Ins. Co.*, 742 N.E.2d 750, 756 (1st Dist. Ill. App. 2000)). Illinois has five appellate districts, and the

decisions of one district are not binding on the others. *Chapman v. Anchor Lumber*, 823 N.E.2d 594, 596 (3d Dist. Ill. App. 2005). Accordingly, even if CIM were correct that the decision below rejected the notion that equitable estoppel could provide a basis for a nonsignatory to compel an arbitration agreement, its complaint would be with only one of five intermediate state appellate courts. This Court does not sit to resolve conflicts among intermediate state appellate courts.

Stretching to present a conflict, CIM incorrectly states that the D.C. Circuit's decision in *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003), conflicts with other federal appellate court decisions holding that non-signatories can compel arbitration in some circumstances. In fact, as CIM explained below, Pet. to Ill. S. Ct. 10-11, *DSMC* did not even reach that question. Rather, the D.C. Circuit held that the court lacked jurisdiction under section 16 of the Federal Arbitration Act—the purported basis for appellate jurisdiction—to consider an interlocutory appeal from denial of a motion by a non-signatory to compel arbitration on equitable estoppel grounds. The court expressly noted that it was taking no position on whether a non-signatory can compel arbitration on the basis of equitable estoppel. *Id.* at 683. Thus, the D.C. Circuit decision does not conflict with decisions of other federal courts of appeal on the question presented. And the jurisdictional point on which the D.C. Circuit decided *DSMC* was not raised or decided in this case.

B. The Decision Below Rests On Factual Determinations And The Application Of State Law.

Consistent with the decisions of the federal courts of appeals, the court below recognized that a non-signatory can

compel arbitration under principles of agency or estoppel. The court held, however, that CIM could not compel arbitration on the facts of this case, applying state-law contract principles.[1]

First, with respect to agency, the court expressly agreed that "a nonsignatory to an arbitration clause can invoke an arbitration agreement under an agency theory." Pet. App. 4a. The court noted, however, that CIM did not ask the trial court to find that Enterprise was its agent and that it "actually refused to take any position in the trial court or [the appellate] court regarding its relationship to Enterprise." *Id.* 6a. Based on this fact, the court held that the agency theory did not apply here. *See also Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 850 (7th Cir. 2002) (questions of agency are fact questions). CIM quarrels with the court for not basing its decision on the agency allegations in the complaint, as it says Illinois law directs the court to do. Pet. 16. This quarrel over state law, however, does not raise a federal question appropriate for Supreme Court review and is not fairly comprised by the question presented.

Second, with respect to equitable estoppel, the appellate court looked to Illinois law, which requires the party asserting estoppel to show detrimental reliance on the acts or representations of the other party. Pet. App. 9a (citing cases). Because CIM could not have reasonably relied to its detriment—and offered no evidence that it did rely—on Ms.

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[1]Under the Federal Arbitration Act, state-law contract principles generally govern the enforceability of arbitration clauses. *Doctor's Assocs., Inc. v. Casarotto*, 518 U.S. 681, 686-87 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Peach's actions with respect to arbitration of any claim against it, equitable estoppel was not satisfied. *Id.* 10a. Again, the court's fact-bound decision on the point was specific to "the record in this case." *Id.*[2]

As CIM points out, the appellate court followed a prior decision rejecting, as a matter of state law, an expanded definition of equitable estoppel adopted by some federal courts. *See, e.g., MS Dealer Service Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999). The court's reliance on state equitable estoppel law was proper because, when deciding whether the parties to a dispute agreed to arbitrate a certain matter, courts generally should apply ordinary state-law contract principles. *See supra* n.1.

Nonetheless, CIM faults the court for relying on state law. Pet. 13-15. CIM's argument on this point provides further reason to deny the petition. The question whether state or federal equitable estoppel law should apply to the determination whether a non-signatory can compel arbitration is not the question presented and is not fairly comprised within it. Moreover, the shallow conflict identified by Petitioner on this question does not warrant review of the decision of the regional intermediate-level state court below.

---

[2]The court's conclusion was also correct. The arbitration provision in Ms. Peach's contract with Enterprise explicitly applies only to disputes between Ms. Peach and the "Dealer," Enterprise. *See supra* p. 2. Not only did CIM never argue that it reasonably relied on any action of Ms. Peach on which equitable estoppel could be based, but the arbitration provision's language would belie any claim of reasonable reliance.

More important, the question whether state or federal estoppel law applies was not preserved below, and thus the Court does not have jurisdiction to decide it. *See* Stern & Gressman, *Supreme Court Practice* 181 (8th ed. 2002) (citing *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945)). CIM's initial memorandum in support of its motion to compel arbitration did not mention equitable estoppel, much less argue about the applicable law; and its reply relegated mention of the federal circuit court cases on which it focuses so heavily now to a "see also" footnote. Def. Mot. Reply 1 n.1. The trial court's brief discussion of equitable estoppel relies almost exclusively on Illinois cases, Pet. App. 16a-17a, yet CIM's briefs on appeal did not argue that the court erred in doing so. Indeed, its opening brief again only mentioned the federal cases in a footnote, Def. Apl. Br. 14 n.6, and not until its reply brief on appeal did CIM even brief the equitable estoppel argument adopted in federal court cases such as *MS Dealer*. Def. Apl. Reply 4-6. Even then, although Ms. Peach's brief plainly assumed that Illinois law applied, Pltf. Apl. Br. 8-9, CIM did not address the choice of law issue. Instead, it argued that its theory was in line with both federal and Illinois law.

Not until a supplemental brief filed after oral argument to address a recent decision of the Illinois Supreme Court did CIM directly argue that federal estoppel law should apply. Def. Supp. Br. 3-4. However, under Illinois law, a question presented for the first time on appeal, which was not argued to the trial court, is not preserved for review. *Haudrich v. Howmedica, Inc.*, 662 N.E.2d 1248, 1253 (Ill. 1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Not surprisingly then, the intermediate appellate court applied Illinois law, but did not address the choice of law question.

Accordingly, in this Court, the issue whether state or federal estoppel law should apply is not presented.

Moreover, in many cases, the choice of state or federal estoppel law will not alter the result. *See, e.g., Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (applying federal law but noting that result would likely be same under Mississippi law). Indeed, regardless of whether state or federal estoppel law applies, the outcome should be the same here. As this Court has explained, "[a]n essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations." *Lyng v. Payne*, 476 U.S. 926, 935 (1986); *see Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 59 (1984). It was this "essential element" that the court below found, as a matter of fact, was lacking here. Pet. App. 10a; *see also supra* n.2. This factual matter is not worthy of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition for Writ of Certiorari to the Appellate Court of Illinois

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INTRODUCTION

Peach cannot, and does not, dispute that the petition presents an issue of exceptional importance: whether a signatory to a contract with an arbitration clause can avoid its obligation to arbitrate by suing a non-signatory defendant under that very contract, and then arguing that the non-signatory is not entitled to invoke the arbitration clause. If Peach, and the court below, are correct, then arbitration clauses are not worth the paper on which they are written, because plaintiffs can always avoid such clauses by simply suing non-signatories. Not surprisingly, no fewer than seven federal courts of appeals have recognized that the Federal Arbitration Act ("FAA") does not allow that gimmick. As these courts recognize, by seeking to saddle a non-signatory with the *burdens* of a contract, a signatory is equitably estopped from seeking to deny the non-signatory the *benefits* of that contract, including the arbitration clause.

Peach argues, however, that there is no conflict because the court below applied state law equitable estoppel principles whereas the federal cases applied federal law equitable estoppel principles. But that argument only underscores the conflict, because both the federal and state cases are applying a single federal statute, the FAA, so the cases necessarily conflict on the underlying question whether equitable estoppel under the FAA is determined by reference to state or federal law. Peach's substantive objection to certiorari thus ultimately collapses into a procedural objection: that the underlying choice-of-law issue is not properly presented here. That objection is frivolous. The court below specifically held that the equitable estoppel analysis under the FAA is governed by state, not federal, law, and that holding is necessarily and obviously challenged by the question presented in the petition.

At bottom, Peach's opposition brief rests on the notion that it is no big deal for the FAA to mean one thing in federal court and another thing in state court. This Court, however, emphatically rejected that notion over twenty years ago, noting

that such disuniformity would "encourage and reward forum shopping" antithetical to the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). This case proves the point: Peach got her desired result by filing in state court in Madison County, Illinois, but would have obtained a very different result by filing in the local federal court, since the Seventh Circuit is among the courts on the other side of the conflict. *See Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981). This Court should not tolerate that situation, especially because Peach purports to sue not only on her own behalf, but on behalf of a nationwide class, thereby effectively evading the law not only of the Seventh Circuit but of the six other federal courts of appeals that have ruled likewise. Accordingly, this Court should grant the petition and resolve the conflict over a signatory's ability to evade its contractual obligation to arbitrate under the FAA by suing a non-signatory.

I. Peach's Substantive Objections Are Meritless.

Peach cannot, and does not, deny that no fewer than seven federal courts of appeals have held that a signatory to an arbitration agreement is equitably estopped under the FAA from opposing arbitration in the specific circumstances presented here—*i.e.*, where the signatory has sued a non-signatory under the very contract that contains an arbitration agreement. *See, e.g., JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 (2d Cir. 2004); *Astra Oil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276, 279-81 (2d Cir. 2003); *Choctaw Generation Ltd. P'ship v. American Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); *Long v. Silver*, 248 F.3d 309, 319-21 (4th Cir. 2001); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527-28 (5th Cir. 2000); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-98 (2d Cir. 1999); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Sunkist Soft*

Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 756-58 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984); *Hughes*, 659 F.2d at 839.

Although the court below specifically acknowledged that its result conflicted with this line of federal cases, *see* Pet. App. 6-9a (citing, *inter alia*, *MS Dealer*, 177 F.3d at 947 and *Grigson*, 210 F.3d at 528), Peach nonetheless asserts that the result below is "fact-bound." Opp. 7. According to Peach, "the court below did not hold that, as a general matter, *a* non-signatory cannot compel arbitration on an equitable estoppel theory," but instead "held that, on the facts of the case, *this* non-signatory cannot compel arbitration on that theory." Opp. 1 (emphasis in original). That assertion is mystifying.

The court below denied CIM's motion to compel arbitration on the ground that CIM could not establish equitable estoppel under the FAA without showing that it "reasonably relied ... to its detriment [on a representation by Peach] that she would arbitrate any claim she had against CIM." Pet. App. 10a. That is, first and foremost, a *legal* determination that a non-signatory under these circumstances must show detrimental reliance. The seven federal courts of appeals cited above, in contrast, do not require such a showing *as a matter of law*. Rather, the courts in those cases recognize that equitable estoppel under the FAA categorically applies where, as here, a signatory seeks to hold a non-signatory liable under a contract with an arbitration clause. *See, e.g.*, *JLM Indus.*, 387 F.3d at 177-78; *Astra Oil*, 344 F.3d at 279-81; *Choctaw*, 271 F.3d at 406; *Dominium*, 248 F.3d at 728; *Long*, 248 F.3d at 319-21; *Grigson*, 210 F.3d at 527-28; *Smith/Enron*, 198 F.3d at 95-98; *MS Dealer*, 177 F.3d at 947; *Sunkist*, 10 F.3d at 756-58; *J.J. Ryan*, 863 F.2d at 321; *Letizia*, 802 F.2d at 1187-88; *McBro*, 741 F.2d at 344; *Hughes*,

659 F.2d at 839. There is nothing remotely "fact-bound" about the decision below that negates this legal conflict.

Nor can Peach negate the conflict by arguing that the court below applied state, rather than federal, law. At issue here is whether the trial court below properly denied CIM's motion to compel arbitration under the FAA, a federal statute. While it is certainly true that "[u]nder the Federal Arbitration Act, state-law contract principles generally govern the *enforceability* of arbitration clauses," Opp. 6 n.1 (citing *Doctor's Assocs., Inc. v. Casarotto*, 518 U.S. 681, 686-87 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)), the point here is that the ability of non-signatories to invoke (or resist) an arbitration agreement "presents no state law question of contract formation or validity," and thus is governed by "the 'federal substantive law of arbitrability,'" *International Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 417-18 & n.4 (4th Cir. 2000); *see also* Pet. 13-15 (citing, *inter alia*, *Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 267 & n.6 (5th Cir. 2004); *Letizia*, 802 F.2d at 1187-88).

Thus, far from negating the conflict, the court below only underscored the conflict by relying on state-law principles of equitable estoppel to resolve CIM's motion to compel arbitration under the FAA. Indeed, Peach herself ultimately concedes—as she must—that the decision below "conflict[s]" with the federal appellate decisions noted above. Opp. 7. She argues, however, that the conflict is "shallow," because the decision below was rendered by an "intermediate-level state court," and not reviewed by the Illinois Supreme Court. *Id.*

As an initial matter, that argument ignores the fact that the court below is not the only state court to hold that a non-signatory's right to compel arbitration under the FAA is governed by state, not federal, law—as noted in the petition, the Supreme Court of Arkansas has held likewise. *See* Pet. 13 (citing *American Ins. Co. v. Cazort*, 871 S.W.2d 575, 579 (Ark. 1994) ("In determining whether nonsignatories should properly

be deemed parties to an arbitration contract pursuant to the Federal Arbitration Act, state law contract principles are invoked.")).

In any event, Peach's argument ignores the rule that where, as here, a State's highest court has denied discretionary review, the State's intermediate appellate court is "the highest court of a State in which a decision could be had," and hence unquestionably subject to this Court's review. 28 U.S.C. § 1257(a). That rule makes sense: state court application of federal law (and denial of federal rights) is not immunized from this Court's review whenever the State's highest court denies discretionary review. To the contrary, this Court often reviews decisions by intermediate state appellate courts where, as here, those decisions conflict with federal appellate decisions or otherwise present important questions of federal law. *See, e.g., Blakely v. Washington*, 124 S. Ct. 2531, 2536 (2004); *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 144 (2003); *Ewing v. California*, 538 U.S. 11, 20 (2003); *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 488-89 (2002); *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 417-18 (2001); *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458, 463 (2000).

The conflict between the decision below and the federal appellate authorities noted above could not be more pronounced: CIM's motion to compel arbitration would have been successful in any of those federal circuits, but was unsuccessful in state court. It is simply not true, thus, that "regardless of whether state or federal estoppel law applies, the outcome should be the same here." Opp. 9. As noted above, the state court here required CIM to show detrimental reliance (which is all but impossible under these circumstances, since signatories are not in a contractual relationship with non-signatories in the first place), whereas the federal cases noted above impose no such requirement.

In addition, as noted in the petition, the court below relied heavily on the D.C. Circuit's conclusion that Section 4 of the FAA (which authorizes motions to compel arbitration) does not authorize a non-signatory to compel arbitration on equitable estoppel grounds. *See* Pet. 11-12; Pet. App. 8-9a (citing, and quoting extensively from, *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003)). Peach insists, however, that *DSMC* stands only for the proposition that a court "lack[s] *jurisdiction* under section 16 of the Federal Arbitration Act ... to consider an interlocutory appeal from denial of a motion by a non-signatory to compel arbitration on equitable estoppel grounds." Opp. 5 (emphasis added).

That argument is disingenuous at best. As explained in the petition, the D.C. Circuit's jurisdictional holding is based on its antecedent substantive conclusion that Section 4 of the FAA does not authorize a motion to compel arbitration by a non-signatory. According to the D.C. Circuit, "Section 4 ... applies only to an 'alleged failure ... to arbitrate *under a written agreement for arbitration*'—not an alleged failure to arbitrate when principles of equitable estoppel indicate that you should." 349 F.3d at 683 (quoting 9 U.S.C. § 4; emphasis added). Accordingly, *DSMC* most definitely stands for the proposition that non-signatories cannot compel arbitration under Section 4 of the FAA on equitable estoppel grounds—which explains why the court below relied so heavily on *DSMC*, *see* Pet. App. 7-9a, and why Peach herself cited that decision below for the proposition that "not all federal appellate circuits agree that the FAA provides a basis for allowing a non-signatory to enforce an arbitration agreement," Reply App. 5a; *see also id.* ("Recently, in *DSMC*, ... the Federal [*sic*] Circuit noted that the FAA governs arbitration agreements and the signatories to them; it does not govern the rights of a party who is not a signatory to an arbitration agreement but seeks to benefit from it anyway.").

II. Peach's Procedural Objections Are Meritless.

Because Peach cannot, and does not, deny the conflict discussed above, she ultimately falls back on the argument that the conflict is not properly presented here. That argument is demonstrably incorrect.

As an initial matter, Peach asserts that "[t]he question whether state or federal equitable estoppel law should apply to the determination whether a non-signatory can compel arbitration is not the question presented [in the petition for certiorari] and is not fairly comprised within it." Opp. 7. That assertion makes no sense.

The question presented here is "[w]hether the Appellate Court of Illinois erred, and deepened a conflict between and among state and federal appellate courts applying the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, by refusing to allow a non-signatory to compel arbitration under the very contract that forms the basis for the non-signatory's alleged liability." Pet. i. That question necessarily and obviously comprises the subsidiary question of what substantive law applies in the first place, since it is impossible to determine whether the state court "erred"—much less "deepened a conflict between and among state and federal appellate courts"—without knowing what law governs. Accordingly, the choice-of-law issue is manifestly comprised within the question presented. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 84-85 (1995) (citing cases); S. Ct. Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

Peach next tries a variation on this theme by arguing that "the question whether state or federal estoppel law applies was not preserved below." Opp. 8. That argument is both legally irrelevant and factually meritless.

As a legal matter, there is no question that the court below *actually addressed* the choice-of-law question, so that the question is indisputably presented for this Court's review.

"Once it is clear that the highest state court has actually passed on the federal question, any inquiry into how or when the question was raised in the state courts is considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised." Robert L. Stern *et al.*, *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002). Because the court below specifically and unequivocally held that equitable estoppel under the FAA is to be determined by reference to state, not federal, law, *see* Pet. App. 9a (citing *Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 542-43 (Ill. App. Ct. 2004)), and that holding conflicts with decisions by other federal and state appellate courts, this Court both can and should review the issue and resolve the conflict.

In any event, as a factual matter, CIM most certainly did raise the federal issue below. Indeed, CIM moved for arbitration under the FAA, a federal statute. Peach asserts that "CIM's initial memorandum in support of its motion to compel arbitration did not mention equitable estoppel, much less argue about the applicable law." Opp. 8. But *of course* CIM's opening brief in support of its motion to compel arbitration in the state trial court did not address equitable estoppel, because that doctrine is a response to a defense (CIM's non-signatory status) that Peach herself had not yet invoked. Once Peach opposed arbitration on that ground, CIM responded that Peach was equitably estopped, and cited the federal cases (applying federal equitable estoppel law) noted above. *See* Reply App. 10-11a & n.1.

Indeed, CIM specifically argued in the state trial court that "*both* Illinois *and federal law* compel arbitration in light of plaintiff's agency theory," and in support of argument noted that "the two [state court] cases cited by plaintiff do not abrogate Illinois or federal law, nor do they address the principle of equitable estoppel applied by several Circuit Courts of Appeal and other courts as discussed above." *Id.* at 12-13a

(emphasis added; capitalization modified). It is simply not true that CIM "relegated mention of the federal circuit court cases on which it focuses so heavily now to a 'see also' footnote," Opp. 8: rather, CIM dropped the footnote to highlight all of the additional federal appellate authority only *after* citing the lead Seventh Circuit case on point, *Hughes*, in the text. Reply App. 10-11a & n.1. Indeed, *Peach herself* specifically acknowledged below that "CIM claim[s] that the [non-signatory] issue [is] governed by a *federal* common law of contracts," whereas Peach "argue[s], instead, that the ability of a non-signatory to enforce the arbitration rights of its agent must be determined under traditional state law contract principles—here, under Illinois contract law." *Id.* at 2a (emphasis in original); *see also id.* at 4a ("CIM says that it does not matter if Illinois law would treat arbitration agreements the same as other contracts; CIM says federal law should govern anyway.").

Peach thus cannot, and in fact does not, deny that CIM presented its federal-law argument in the state courts below. Rather, as Peach acknowledges, CIM argued below "that its [equitable estoppel] theory was in line with *both* federal and Illinois law." Opp. 8 (emphasis added). By so doing, of course, CIM manifestly preserved its federal-law argument: CIM obviously did not have to argue that state law *differed* from federal law to preserve the argument that federal law required the court to compel arbitration. Peach's assertion that this Court "does not have jurisdiction to decide" the question presented in this case, *id.*, is thus inexplicable.

Finally, Peach errs by challenging CIM's alternative argument that the courts below violated the FAA *even if* state law governed the non-signatory issue by applying such law in a manner discriminatory toward arbitration. *See* Pet. 15-16. CIM's assertion that "[t]his quarrel over state law ... does not raise a federal question," Opp. 6, is manifestly incorrect: as noted in the petition, the discriminatory application of state law to arbitration agreements violates the FAA as a matter of

federal law, *see* Pet. 16 (citing *Doctor's Assocs.*, 517 U.S. at 687). And again, that issue is most definitely "comprised by the question presented" in the petition, Opp. 6, because that question involves the right of "a non-signatory to compel arbitration" under the FAA, Pet. i, and the state court denied that right through the discriminatory application of state law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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May 26, 2005

APPENDIX

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No. 5-03-0684

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ARMETTIA PEACH, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. CIM INSURANCE CORPORATION, Defendant-Appellant.	Appeal from the Circuit Court of the Third Judicial Circuit of Illinois, Madison County, Illinois Case No. 02 L 1253 Honorable Nicholas Byron Judge Presiding

SUPPLEMENTAL BRIEF

During oral argument, the panel asked if the recent decision of the Supreme Court of Illinois in *Borowiec v. Gateway 2000*, 2004 WL 636562 (Ill. 2004), impacted upon the resolution of any pending issue in this appeal. The answer is—Yes.[1]

In *Borowiec*, the Supreme Court considered whether the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act barred arbitration of a consumer's claims under the Act. The Court held that the Magnuson-Moss Act does not bar arbitration of such claims. Dissimilarly, the appeal now before this Court does not involve claims under the Magnuson-Moss Act or, for that matter, under any federal

[1] Plaintiff's recent request for a transcript of the oral argument was denied. In the absence of a transcript, which would have confirmed the specific context in which the Court inquired about the *Borowiec* decision, Plaintiff shall attempt to address any and all points that could have any conceivable relevance to the case at bar.

statute. The instant appeal also does not involve any contention by Plaintiff that any particular statutory scheme granted Plaintiff a substantive right to a judicial forum that would be violated by compulsory arbitration. Therefore, at first glance, *Borowiec* does not appear to be relevant to the primary issues in the instant appeal.

The instant appeal *does* involve two over-arching issues. The first issue is whether CIM may enforce the arbitration agreement in this case even though it is not a signatory to that agreement. *Borowiec* does not address non-signatory rights at all. The second issue is whether the arbitration agreement itself is unconscionable. In *Borowiec*, the Court expressly declined to address the plaintiff's claims that the arbitration provision was unconscionable. Thus, upon cursory review, *Borowiec* again does not appear to be relevant to the primary issues in the instant appeal.

Looking deeper, however, *Borowiec* may be instructive on some important underlying issues that overlap in the case at bar.

The panel's inquiry regarding *Borowiec* occurred during Plaintiff's counsel's discussion of the non-signatory issue. Plaintiff's counsel was recounting the historical underpinnings of the FAA, observing that the FAA was intended to correct longstanding judicial discrimination against arbitration agreements, and to place arbitration agreements on an equal footing with other contracts, but otherwise to leave arbitration agreements to governance under state contract law. Plaintiff's counsel then suggested that CIM's argument on the non-signatory issue was inconsistent with the intent of the FAA because CIM claimed that the issue was governed by a *federal* common law of contracts that applied *different* rules to the construction and enforcement of arbitration agreements than to any other types of contracts. Plaintiff's counsel argued, instead, that the ability of a non-signatory to enforce the arbitration rights of its agent must be determined under traditional state law contract principles—here, under Illinois contract law.

Finally, Plaintiff's counsel argued that there is no precedent in Illinois for a principal to enforce the contractual rights of its agent under circumstances such as are presented in this case, and that the adoption of such a rule in this case, applicable only to arbitration agreements but not to other types of contracts, would itself be inconsistent with—and possibly violative of—the FAA. *Borowiec* is not to the contrary.

The *Borowiec* Court itself acknowledged the same, basic legislative history and statutory purpose of the FAA, stating:

> Congress enacted the Arbitration Act in 1925 to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.

Id. at *4 (citations and quotations omitted). Quoting U.S. Supreme Court precedent, the *Borowiec* Court went on to observe that, absent disparate treatment of arbitration agreements *vis-à-vis* other types of contracts, state law governs issues relating to the validity, revocability and enforceability of arbitration agreements:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

Id. at *5 (citations and quotations omitted). Finally, in language that is consistent with Plaintiff's position on the proper resolution of the non-signatory issue in this case, the *Borowiec* Court said:

> A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the FAA].

Id. (citations and quotations omitted). *Borowiec* thus stands for two important propositions: first, that state law governs issues regarding the enforceability of arbitration agreements as long as that state law treats arbitration agreements the same as contracts generally; and second, that a state-law rule that treats arbitration agreements in a special or different manner violates the FAA.

These two propositions are irreconcilable with CIM's position in this case. CIM says that it does not matter if Illinois law would treat arbitration agreements the same as other contracts; CIM says federal law should govern anyway. That is not consistent with the *Borowiec* decision. CIM also seems to say that, even if this Court would not allow a non-signatory to enforce a traditional contract under the circumstances presented in this case, the Court should allow non-signatory enforcement here *because* this case involves an arbitration agreement. *Borowiec* specifically forbids such different treatment for arbitration agreements.

Presumably, CIM would attempt to draw this Court's attention to that part of the *Borowiec* decision in which the Supreme Court suggested that, where all federal appellate courts are uniform in their resolution of an issue of federal statutory law, a state supreme court should follow suit. *Id.* at *11. CIM would then argue that all federal appellate courts that have considered the issue have held that there is a federal common law developed under the FAA which allows non-signatories to enforce arbitration agreements, and CIM would suggest that, as indicated in *Borowiec*, this Court should now follow suit. This anticipated argument would be flawed for at least three reasons.

First, the issue in *Borowiec* involved the interrelationship between two federal statutory schemes—*i.e.*, the Magnuson-Moss Act and the FAA—not the interrelationship between a federal statutory scheme and state jurisprudence. It is one thing to say that state courts should defer to federal appellate determinations regarding the former. It is another thing to

suggest that state courts should abdicate their own state's jurisprudence, not because it is the right thing to do, but because one or more federal appellate courts say so. *Borowiec* does not support such blind deference.

Second, and as discussed above, the FAA specifically anticipates that state law will govern issues concerning the validity, enforceability and revocability of arbitration agreements, provided that such issues are resolved in accordance with the state's traditional contract law principles, and not on grounds unique to arbitration agreements. Thus, the FAA specifically commits the resolution of the issue under consideration here to the jurisprudence of the State of Illinois and its courts. It is, therefore, absurd to suggest that, under *Borowiec*, this Court should ignore that responsibility and simply follow foreign decisional law. *Borowiec* neither commands nor even supports such an abdication of this Court's judicial responsibility.

Third, and as noted by Plaintiff's counsel during oral argument, not all federal appellate circuits agree that the FAA provides a basis for allowing a non-signatory to enforce an arbitration agreement. Recently, in *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679 (Fed. Cir. 2003) (copy attached hereto as Exhibit #1), the Federal Circuit noted that the FAA governs arbitration agreements and the signatories to them; it does not govern the rights of a party who is not a signatory to an arbitration agreement but seeks to benefit from it anyway. *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. 2003). Specifically, the court in *DSMC* held as follows:

> *Convera's motion to compel was expressly based on principles of equitable estoppel.* Convera contended that the relation between DSMC's claims against it and DSMC's claims against NGTL was such that DSMC should be compelled to arbitrate the former along with the latter.

Section 4, however, applies only to an "alleged failure ... to arbitrate under a written agreement for arbitration"—not an alleged failure to arbitrate when principles of equitable estoppel indicate that you should. Convera argued that the DSMC/NGTL contract "satisfies the written arbitration agreement requirement," Convera's Mem. Supp. Mot. to Compel, at 6, but Section 4 does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. Convera's motion to compel is not based on any alleged failure by DSMC to arbitrate under the only written agreement at issue here—the one between DSMC and NGTL. *The motion is instead based on an effort to expand DSMC's obligation beyond the terms of that written agreement pursuant to principles of equitable estoppel. As appellants acknowledge, "[t]he doctrine of equitable estoppel . . . by definition applies where there is no written contract between the parties*...." Reply Br. at 6.

Convera recognizes that there is no precedent from this court compelling a party to an arbitration agreement to arbitrate with a non-signatory on the basis of equitable estoppel, *see* Appellants' Br. at 22, but cites cases from other circuits that have done so. Those cases typically did not address jurisdiction under Section 16 of the FAA, but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with non-signatories. We need not and do not decide whether such an effort can ever succeed. *What we do decide is that an effort to compel arbitration in*

> *such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA.*

Id. at page 684 (emphasis added). Therefore, to the extent that CIM and all of its cited cases rely on the FAA as the basis for deriving and applying a non-signatory right to enforce arbitration agreements, they are simply wrong. State law governs that issue, and Illinois law does not support CIM's ability to enforce the arbitration agreement under the circumstances in this case.

Finally, *Borowiec* is also relevant to Plaintiff's claim that the arbitration agreement is cost-prohibitively unconscionable, and to CIM's response that it may moot that issue by agreeing in this litigation to pay all costs of arbitration. The dissent in *Borowiec*, addressing an issue that the majority never reached, stated as follows:

> Gateway argues, in the alternative, that even if its binding arbitration provisions are unenforceable with respect to plaintiffs' warranty claims, they can still be applied to require arbitration of plaintiffs' non-Warranty Act claims. This argument is untenable. Because the Magnuson-Moss Warranty Act prohibits inclusion of mandatory binding arbitration provisions in warranties on consumer products, those provisions should not have been in the warranties extended to plaintiffs by Gateway. Because they should not have been included in the warranties, they have no force or effect. *We must treat them as if they do not exist. That is the consequence of finding them void and unenforceable. No principle of contract law permits us to excise the arbitration provisions from the warranties, where they are illegal, and restore them to the agreement in some other place in some other way for some other purpose.*

Id. at *27 (Rarick, J., Dissenting) (emphasis added). For the same reason in the case at bar, CIM's attempt to moot the cost-prohibitive issue by agreeing to pay all costs must fail. Simply stated, there is no principle of Illinois contract law that permits one party to unilaterally modify an otherwise unconscionable contract, in order to negate the unconscionable terms thereof, and thereby allow enforcement of the remainder. Although CIM's brief cites some foreign decisions in which the courts have allowed such unilateral novations in order to find arbitration provisions enforceable, the dissent in *Borowiec* confirms that Illinois contract law will not countenance such mischief merely to find a way to enforce arbitration.

Dated: May 12, 2004.

Respectfully submitted,

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**IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

ARMETTIA PEACH, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	No. 02 L 1253
v.	)	Judge Nicholas G. Byron
CIM INSURANCE CORPORATION,	)	
Defendant.	)	

DEFENDANT CIM INSURANCE CORPORATION'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION AND TO STAY LITIGATION OF PLAINTIFF'S FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiff's opposition brief principally relies upon policies and case law from foreign jurisdictions that do not share Illinois' preference for enforcing conspicuous arbitration provisions. And significantly, plaintiff seeks to repudiate the agency allegations in her own Amended Complaint in order to escape enforcement of the arbitration provision by defendant CIM, the alleged principal that plaintiff asserts should be vicariously liable under the Retail Contract.

Plaintiff cannot have it both ways. She cannot rely on an agency theory to seek to hold CIM liable under the Retail Contract when it works to her advantage, and then repudiate her agency allegations and the arbitration clause in the Retail Contract when it works to her disadvantage. Indeed, as the Seventh Circuit has held, it would be "***manifestly inequitable***" to permit a plaintiff to claim that a defendant is liable under a contract but at the same time deny that the defendant is a party to the contract in order to avoid the arbitration clause. *Hughes Masonry Company, Inc. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (party estopped from repudiating arbitration clause of agreement upon which it relies) (emphasis added). Other courts agree.[1]

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[1] *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,*

Yet that is precisely what plaintiff Peach seeks to do here. Plaintiff's Amended Complaint asserts that CIM should be vicariously liable for representations made by its alleged agent Enterprise in the Retail Contract, even though CIM was not a party to the Contract. But in opposing CIM's Motion To Compel Arbitration, plaintiff asks the Court to disregard her agency allegations and to invalidate the one part of the Retail Contract that plaintiff finds unfavorable, the arbitration clause. In short, plaintiff is equitably estopped from shifting her allegations as the "winds of self-interest change." *See Department of Transp. v. Coe*, 112 Ill. App. 3d 506, 507, 445 N.E.2d 506 (4th Dist. 1983) ("Truth is not a weather vane. It does not veer when the winds of self-interest change.").

The remainder of plaintiff's arguments are merely public policy objections to a straightforward application of Illinois and federal arbitration law. This Court need not stray far from the undisputed facts and law established in the opening briefs:

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206 F.3d 411, 418 (4th Cir. 2000) (when party has "consistently maintained that other provisions of the same contract should be enforced to benefit him," he is "equitably estopped" from claiming that the arbitration clause does not apply); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000), *cert. denied*, 531 U.S. 1013 (2000) (applying doctrine of equitable estoppel, court held that "a signatory to [an] agreement *cannot* ... 'have it both ways' it cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory") (emphasis original); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) ("[E]quitable estoppel allows a nonsignatory to compel arbitration . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory.") (internal citations and quotations omitted); *Avila Group, Inc. v. Norma J. of California*, 426 F. Supp. 537, 540 (S.D.N.Y. 1977) ("To allow [a party] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

- Plaintiff concedes that each of her claims against CIM "arises out" of a written Retail Contract that contains a clear and conspicuous arbitration clause.

- Plaintiff concedes that settled Illinois law "embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes." *See Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 443, 530 N.E.2d 439, 443 (1988).

- Plaintiff concedes that under federal and Illinois law, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983); *see also* cases cited in CIM's Opening Brf. at 4 n.3.

- Plaintiff concedes that a non-signatory may invoke an arbitration clause. *See Caligiuri v. First Colony Life Ins. Co.*, 318 Ill. App. 3d 793, 800, 742 N.E.2d 750, 756 (1st Dist. 2000).

- Plaintiff concedes that this litigation should be stayed if the Court compels arbitration.

The principles and authorities compel plaintiff to arbitrate her claims here.

I. BOTH ILLINOIS AND FEDERAL LAW COMPEL ARBITRATION IN LIGHT OF PLAINTIFF'S AGENCY THEORY.

Plaintiff does not dispute that Illinois and federal courts have recognized that a non-signatory to a contract may invoke an arbitration clause under an agency theory. *See Caliguiri*, 318 Ill. App. at 800, 742 N.E.2d at 756; *Morrie & Shirlee Mages Found. v. Thrifty Corp.*, 916 F.2d 402, 407 (7th Cir. 1990); *Stone Distrib. Co. v. Meyers*, 157 F.R.D. 405, 409 (N.D. Ill.

1994).[2] But plaintiff offers ***no*** Illinois or federal authorities to support her counter-argument that an agency theory "cannot defeat the parties' intent" to limit arbitration solely to the parties to an agreement. (Opp. at 3) The two Alabama cases cited by plaintiff do not abrogate Illinois or federal law, nor do they address the principle of equitable estoppel applied by several Circuit Courts of Appeal and other courts as discussed above. *See Carriage Homes v. Channell*, 777 So. 2d 83, 84 (Ala. 2000); *Parkway Dodge, Inc. v. Yarbrough*, 779 So. 2d 1205, 1209-10 (Ala. 2000). CIM, as Enterprise's alleged principal, has a right to invoke the arbitration clause in this case because all of plaintiff's claims against CIM arise from the contract containing the clause.

* * *

[2] *See also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3rd Cir. 1993) ("Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."); *Goldberg v. Focus Affiliates Inc*., 152 F. Supp. 2d 978, 983 (N.D. Ill. 2001) (Because the plaintiff's claims against the agent were substantively the same as his claims against the principal, the agent "is entitled to invoke the arbitration provision entered into by his principal.")

No. 04-1221

IN THE
Supreme Court of the United States

CIM INSURANCE CORPORATION,

Petitioner,

v.

ARMETTIA PEACH, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner respectfully files this supplemental brief to bring to the Court's attention several cases decided since the petition was filed some ten months ago. These new cases underscore the important and recurring nature of the issues presented, the widespread confusion among the lower courts on those issues, and the consequent need for this Court's guidance.

The petition presents the question "[w]hether the Appellate Court of Illinois erred, and deepened a conflict between and among state and federal appellate courts applying the Federal Arbitration Act ["FAA"], 9 U.S.C. § 1 *et seq.*, by refusing to allow a non-signatory to compel arbitration under the very contract that forms the basis for the non-signatory's alleged liability." Pet. i. To resolve that question, of course, it is necessary to determine as a threshold matter whether the FAA itself provides the answer as a matter of *federal* law, or whether the statute looks to *state* law on this issue.

As explained in the petition, the Illinois Appellate Court held that the matter is governed by *state* law. *See* Pet. App. 9a-10a (citing *Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 542 (Ill. App. Ct. 2004)); *see also American Ins. Co. v. Cazort*, 871 S.W.2d 575, 579 (Ark. 1994). That decision squarely conflicts with federal appellate cases holding that the matter is governed by *federal* law. *See, e.g., Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 267 & n.6 (5th Cir. 2004); *International Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 417-18 & n.4 (4th Cir. 2000); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986). This choice-of-law issue has immense practical importance because no fewer than

seven federal courts of appeals have concluded, apparently as a matter of federal law, that a non-signatory *can* compel a signatory to arbitrate where (as here) the signatory has sued the non-signatory under the very contract containing an arbitration agreement. *See* Pet. 1-2, 9 (citing *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 (2d Cir. 2004); *Astra Oil Co. v. Rover Navigation, Inc.*, 344 F.3d 276, 279-81 (2d Cir. 2003); *Choctaw Generation Ltd. P'ship v. American Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527-28 (5th Cir. 2000); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-98 (2d Cir. 1999); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 756-58 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981)). The Appellate Court of Illinois in this case, as in its previous decision in *Ervin*, expressly declined to follow these federal precedents as a matter of state law. *See* Pet. App. 9a-10a; *Ervin*, 812 N.E.2d at 542.

The Texas Supreme Court has wandered into this choice-of-law thicket twice since the petition in this case was filed, and unsurprisingly concluded that "it is not entirely clear what substantive law governs" the arbitration rights and obligations of non-signatories under the FAA. *In re Weekley Homes, L.P.*, No. 04-

0119, __ S.W.3d __, 2005 WL 2807410, at *2 (Tex. Oct. 28, 2005); *see also In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738-39 (Tex. 2005). The court noted that because "[t]he FAA does not specify whether state or federal law governs, and the United States Supreme Court has not directly addressed the issue," the lower state and federal courts are divided. *Id.* at 738; *see also id.* ("[C]ourts have applied both federal and state law to determine" the rights and obligations of non-signatories) (citing cases). In particular, the court explained, "[f]ederal courts of appeals ... have frequently applied federal substantive law" in deciding this issue. *Id.* (citing, *inter alia*, *Bailey*, 364 F.3d at 267 n.6; *Dominium*, 248 F.3d at 728; *International Paper*, 206 F.3d at 417 n.4). The Texas court, however, expressly rested its decisions "on state law," as "*informed by* persuasive and well-reasoned federal precedent." *Id.* at 739 (emphasis added); *see also Weekley Homes*, __ S.W.3d at __, 2005 WL 2807410, at *2 ("*Pending an answer from the United States Supreme Court*, we apply state law while endeavoring to keep it as consistent as possible with federal law.") (emphasis added).[1]

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[1] State courts in Mississippi and Georgia have also looked to state law over the past year to analyze the arbitration rights and obligations of non-signatories under the FAA. *See B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 491-93 (Miss. 2005) (citing the Appellate Court of Illinois' decisions in this case and *Ervin*, and rejecting contrary federal authorities); *but see id.* at 495-96 (Smith, C.J., dissenting) (advocating federal approach); *LaSonde v. CitiFinancial Mortgage Co.*, 614 S.E.2d 224, 226 (Ga. App. 2005) (permitting non-signatory to compel arbitration under state law, and stating that "[f]ederal law provides *guidance* for determining the circumstances under which a nonsignatory may be bound by [arbitration] agreements") (emphasis added; internal quotation omitted).

On the other hand, federal courts continue to treat the issue as one governed by federal law, analyzing it without any reference to state law (and instead looking to federal cases from other States). *See, e.g.*, *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005); *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 70 (2d Cir. 2005); *cf. Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752, 761-72 (N.D. Ill. 2005) (Filip, J.) (applying federal law and specifically rejecting the Appellate Court of Illinois' contrary decisions in this case and *Ervin* as "in conflict with" the line of federal decisions noted above, including *Grigson* and *MS Dealer*).

Regardless of which side of the conflict is correct, this Court should resolve the issue whether the arbitration rights and obligations of non-signatories under the FAA are governed by federal or state law. As underscored by the Texas decisions noted above, the conflict presented by this case is open and notorious. *See Weekley Homes*, __ S.W.3d at __, 2005 WL 2807410, at *2; *Kellogg*, 166 S.W.3d at 738-39; *see also* Gary B. Born, *International Commercial Arbitration* at 667-68 (2d ed. 2001) (noting conflict among lower courts on whether federal or state law governs the rights and obligations of non-signatories under the FAA); Frank Z. LaForge, *Inequitable Estoppel: Arbitrating With Nonsignatory Defendants Under* Grigson v. Creative Artists, 84 Tex. L. Rev. 225, 226-28 (2005) (noting that decision below in this case conflicts with other federal and state lower-court decisions and that "[t]he Supreme Court has yet to render a decision addressing the matter"). If there is any area of the law where clarity is imperative, it is arbitration: after all, to spend time and money litigating about whether to litigate in the first place defeats the whole point of

arbitration. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 278 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). It is especially troubling that, as a practical matter, state courts are looking to state law in deciding the arbitration rights and obligations of non-signatories under the FAA, while federal courts are looking to federal law to decide that very same question. A party's substantive arbitration rights should not turn on the forum in which those rights are invoked, and this Court should not interpret the FAA to encourage and reward forum-shopping. *See, e.g., Allied-Bruce*, 513 U.S. at 271-72; *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

Finally, petitioner respectfully submits that this case warrants this Court's review regardless of the disposition of *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (argued Nov. 29, 2005). That case presents the question whether the federal severability rule announced in *Prima Paint*, 388 U.S. at 402-04, applies regardless of the nature of a plaintiff's state-law challenge to the underlying contract, and the state-law severability implications of that challenge. That question is not implicated here, and *Buckeye* will not resolve the distinct question whether federal or state law governs a non-signatory's rights and obligations under the FAA. Because the latter question is vitally important to arbitration, and because the lower courts are squarely divided on that question, this Court should grant review here to provide an answer.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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